86-376

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

30pp

QUESTIONS PRESENTED

1. Whether a brief, on-site search of an automobile that has been taken into police custody after the arrest of its driver is unreasonable under the Fourth Amendment because it is not undertaken both pursuant to an on-site inventory policy and by officers intending to implement such a policy.

2. Whether the search of an automobile incident to the arrest of its driver, which is begun while the driver is at the scene of the arrest, is rendered unreasonable under the Fourth Amendment when, during the search, the driver is removed from the scene.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement	2
Reasons For Granting The Writ	6
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:	Page
Bell v. Wolfish, 441 U.S. 520 (1979)	9
Brown v. Illinois, 442 U.S. 590 (1975)	10
Cady v. Dombrowski, 413 U.S. 433 (1973)	8
Chimel v. California, 395 U.S. 752 (1969)	12
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975)	6
Illinois v. LaFayette, 462 U.S. 640 (1983)	8, 9
Matter of One 1969 Chev. 2-door, etc., 121 Ariz. 532, 591 P.2d 1309 (Ct. of Ap., Div. 1, Dep't B 1979)	11
Mayhood v. State, 669 S.W.2d 873 (Tex. App., 13 Dist. 1984)	11
Michigan v. Tyler, 436 U.S. 499 (1977)	9
Moran v. Burbine, —U.S.—, 106 S. Ct. 1135 (1986)	9
New York v. Belton, 453 U.S. 545 (1981)	11, 13
New York v. Quarles, 467 U.S. 649 (1984)	8
Nix v. Williams, 467 U.S. 431 (1984)	6
Preston v. United States, 376 U.S. 364 (1964)	12
Scott v. United States, 436 U.S. 128 (1978)	7, 10
Shipley v. California, 395 U.S. 818 (1969)	12
South Dakota v. Opperman, 428 U.S. 364 (1976)	6, 9
State v. Blair, 691 S.W.2d 259 (Mo. 1985), *cert. granted*, 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (No. 85-303)	10

Cases—Continued Page

State v. Hudson, 390 F.2d 509 (1st Cir. 1979) 11

State v. Walker, 579 P.2d 1091 (Ariz. 1978) *(en banc)* 11

Stoner v. California, 376 U.S. 483 (1964) 12

United States v. Hall, 565 F.2d 917 (5th Cir. 1978) 11

United States v. Hellman, 556 F.2d 442 (9th Cir. 1977) 10, 11

United States v. Leon, 468 U.S. 879 (1984) 10

United States v. Prescott, 599 F.2d 103 (5th Cir. 1979) 11

United States v. Jackson, 529 F. Supp. 1947, (D. Md. 1981) 11

United States v. Robinson, 414 U.S. 218 (1973) 7

Statutes:

Conn. Gen. Stat. § 19-443 (20) (1981 Rev.) 3

Conn. Gen. Stat. § 19480(a) (Rev. to 1981) 2, 5

Conn. Gen. Stat. § 19-480(c) (1981 Rev.) 3

Conn. Gen. Stat. § 54-94a (1985) 5

Miscellaneous:

1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* (1978 & 1986 Supp.) 7

1 W. Ringel, *Searches and Seizures, Arrests and Confessions* (1985) 13

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th Ed. 1986) 6

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

No. _____

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

The State of Connecticut petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINION BELOW

The opinion of the Connecticut Supreme Court (App. at 1a-29a) is reported at 200 Conn. 412, —A.2d— (1986).

JURISDICTION

The judgment of the Connecticut Supreme Court was rendered on July 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The respondent was convicted in Connecticut Superior Court of illegal possession and transportation of heroin with intent to sell, in violation of Conn. Gen. Stat. § 19-480(a) (Rev. to 1981), after the trial court accepted his plea of nolo contendere, conditional upon appellate review of his motion to suppress certain evidence. He was sentenced to fifteen years imprisonment. R. at 3.[1] On appeal, the Connecticut Supreme Court concluded that the trial court erred in denying the respondent's motion to suppress on the grounds relied upon by the trial court. Nevertheless, it remanded the case for further proceedings to determine whether another basis for admission of the evidence existed. App. at 2a-3a.

1. On March 14, 1982, Connecticut state trooper Peter Naples stopped a blue Cadillac for speeding on an interstate highway in Middletown, Connecticut. The respondent was driving. Naples, who parked his cruiser behind the Cadillac, obtained from the

---

[1] Reference to the record of this case are as follows: "R. at ____" refers to the record before the Connecticut Supreme Court.

"Tr. at ____" refers to the transcript of that portion of the suppression hearing held on February 15, 1983.

respondent his license and then returned to his cruiser to prepare a motor vehicle summons. As he did so he noticed the respondent make "a lot of . . . unsual movements"; Tr. at 18; the respondent "was leaning somewhat toward the middle of the seat and bending down. He would come up and go down again, [which] just didn't seem proper to [Naples] based on other motor vehicle stops [he] had made." Ibid.; App. at 3a, 10a.

Because of his concern over this unusual conduct, the trooper contacted state police headquarters to obtain more information relating to the respondent's license and registration. Tr. at 19; App. at 10a. Naples was informed by the dispatcher that there were outstanding arrest warrants for the defendant on felony charges of possession of narcotics with intent to sell, possession of narcotics, possession of controlled drugs, possession of drug paraphernalia in a drug factory situation, and two counts of possession of a sawed-off shotgun.[2] He also was told that the respondent was not the registered owner of the Cadillac and that he might have one or two sawed-off shotguns in his possession. Tr. at 20-22, 36; App. at 10a-11a.

Trooper Naples, who was "very concerned for [his] safety"; Tr. at 21; did nothing until another trooper, Karl Kiernan, arrived as back up. Trooper Kiernan parked behind Naples' cruiser and then entered it on the passenger side, as the respondent, now still, looked on through his rear-view mirror. Tr. at 23-23; App. at 11a.

The troopers discussed ways to remove the respondent from the Cadillac. Tr. at 23. Because motorists on the interstate were

---

[2] A "drug factory" was defined by statute to be "any place used for the manufacturing, mixing, compounding, refining, processing, packaging, distributing, storing, keeping, holding, administering or assembling illegal substances contrary to the provision of this chapter, or any building, rooms or location which contains equipment or paraphernalia used for this purpose." Conn. Gen. Stat. § 19-443(20) (1981 Rev.); see Conn. Gen. Stat. § 19-480(c) (1981 Rev.).

slowing down to observe the activity and spectators had begun to gather on a nearby overpass, the troopers decided against ordering the respondent out of his vehicle by the use of a public address system. Tr. at 23-25. Instead, Trooper Kiernan, armed with a shotgun, draped himself over the trunk of the Cadillac and tapped the barrel of the gun on the rear window as Trooper Naples approached the driver's door with his weapon drawn. Tr. at 25-26. Naples ordered the respondent to put his hands on the steering wheel and then to exit the vehicle. *Ibid.* The respondent, who was a large man, complied with the request without resistance. He was patted down, handcuffed (hands in front owing to his large size), advised of his rights and the charges against him, and placed in the front passenger seat of Naples' cruiser. The passenger seat belts were clasped into place around him. App. at 11a.

Believing that there were narcotics or weapons in the Cadillac, the troopers returned to it to conduct a search. Naples removed a blue windbreaker from under the front seat, where the respondent earlier appeared to be reaching; as he did so, a zippered black bag, which he thought may have contained narcotics or a handgun, fell out. Without opening the bag or telling Kiernan of it, Naples placed it on the floor of the front seat area and summoned a wrecker to tow the Cadillac to headquarters. Tr. at 32. He was then instructed by the dispatcher to drive toward headquarters with the respondent and to meet another trooper, who would assist in bringing the respondent to headquarters for booking. Tr. at 33; App. at 11a-12a.

Trooper Kiernan, who had been searching the rear of the vehicle, noticed the black bag and windbreaker on the floor of the front seat area; he opened the bag and observed within numerous small envelopes containing a white powdery substance that was later determined to be heroin. App. at 12a.

At approximately the same time of this discovery, Naples departed the scene with the respondent. Kiernan took possession

of the black bag and the Cadillac was shortly thereafter towed to state police headquarters.[3] App. at 12a.

2. Prior to his trial for illegal possession and transportation of heroin with intent to sell; Conn. Gen. Stat. § 19-480(a) (Rev. to 1981); the respondent moved to suppress the evidence seized from the Cadillac. The trial court denied the motion, finding the seizure to be justified on three alternative grounds: (1) the vehicle search was incident to the respondent's lawful arrest; (2) the search was supported by probable cause to believe the vehicle contained dangerous weapons and required no warrant under the law applicable to auto searches; and (3) the search was a proper inventory search of the contents of a lawfully impounded vehicle. App. at 13a. The respondent pled nolo contendere to the charges, reserving his right to appellate review of the suppression ruling. *See* Conn. Gen. Stat. § 54-94a (1985).

3. On appeal, the Connecticut Supreme Court rejected all three grounds for admitting the evidence. It concluded that (1) the search could not have been incident to the respondent's arrest inasmuch as the evidence was seized as the respondent was being taken from the scene of the arrest; App. at 17a; (2) there was insufficient evidence to establish probable cause to believe the respondent possessed wapons;[4] App. at 20a; and (3) that, because the officers did not search the vehicle pursuant to a formal on-site inventory policy, the inventory exception to the warrant requirement was not applicable.[5] App. at 21a.

---

[3] The vehicle was searched at headquarters pursuant to a warrant, but no additional evidence was discovered. App. at 11a-12a.

[4] The petitioner does not seek review of the state supreme court's decision on the question of probable cause only because of the limited national significance the resolution of such a question here presents.

[5] The Court nevertheless remanded the case so that the trial court could determine whether the evidence inevitably would have been dis-

REASONS FOR GRANTING THE WRIT

This petition presents two significant and recurring questions relating to automobile searches that have yet to be answered by this Court. The first concerns whether a search objectively reasonable under the Fourth Amendment can be rendered unreasonable because it is not conducted both pursuant to a formal police policy and by officers who subjectively intend to implement such a policy. The second asks the Court to clarify in the automobile context the temporal and geographic scope of the "search incident to arrest" exception to the warrant requirement. Because there is a conflict among state and federal courts on the first issue and obvious confusion on the second, and because resolution of both issues would assist significantly state and federal law enforcement officers who frequently are required to arrest motorists and take their vehicles into custody, this Court should grant the petition and review the decision below.

1. In *South Dakota v. Opperman,* 428 U.S. 364 (1976), this Court concluded that a search to inventory the contents of an automobile in police custody was reasonable under the Fourth Amendment. It reached that conclusion after considering the diminished expectation of privacy one has in the contents of an automobile and the need to (1) protect the owner's property while the vehicle is in police custody; (2) protect the police against claims or disputes over lost or stolen property; and (3) protect police and the public from potential danger. *Id.* at 369, 375 n.10.

---

covered by lawful means already initiated at the time of the illegal police conduct. App. at 20a-22a; *see Nix v. Williams,* 467 U.S. 431 (1984).

Because the federal questions presented by this petition have been finally resolved and further proceedings on remand could preclude review of those issues, this case is ripe for review by this Court. *See Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 482-83 (1975); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.10 (6th Ed. 1986).

This Court pointed out, however, that the search in that case was conducted pursuant to "*standard procedures* in the local police department" and was not "a pretext concealing an investigatory police motive." *Id.* at 374-75, 375-76 (emphasis in original). The Court viewed the presence of standard procedures authorizing such searches as "a factor tending to insure that the intrusion would be limited in scope to the extent necessary to carry out the [police] caretaking function." *Id.* at 375.

The question here is whether the brief, on-site search of a vehicle taken into police custody is rendered unreasonable simply because it is not conducted both pursuant to an inventory policy and by officers intending to implement such a policy.[6] The decisions of this Court and sound principles of Fourth Amendment jurisprudence suggest the answer.

a. In recent years this Court's opinions have indicated that the Fourth Amendment is not violated, nor a violation thereof mitigated, by the state of mind of police officers. In *Scott v. United States,* 436 U.S. 128 (1978), which involved the federal wiretap statute, the Court stated the controlling rule: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138; *see also United States v. Robinson,* 414 U.S. 218, 236 (1973) (search incident to arrest justified regardless of fact that officer had no subjective fear that suspect was armed); 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment,* § 3.2 (1978 & 1986 Supp.).

---

[6] The search here was otherwise reasonable because it was limited in scope and surely would have qualified as an "inventory search" had the offiecers been acting in accordance with, and in order to implement a formal on-site inventory policy.

The rule identified in *Scott* has since been applied to inventory searches. In a case involving the inventory of items in the possession of a person taken into custody, the Court identified the security risks presented when unknown items are brought into a holding area and concluded: "It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independently of a particular officer's subjective concerns." *Illinois v. Lafayette,* 462 U.S. 640, 646 (1983).[7]

The same may be said, of course, concerning on-site automobile inventory searches. The authority of the police to take the vehicle into custody arises regardless of the state of mind of the officer, as does the need to protect the owner's property, to guard against false property claims by the owner, and to protect the police and the public from potential danger. Neither the bailment relationship between the arrestee and the police nor the caretaking function of the police is in any way affected by the state of mind of the searching officers.[8]

b. Similarly, each of the factors justifying an inventory search arises regardless of the existence of a formal on-site inventory policy. Thus, while such a policy would help police officers to fulfill their bailment and caretaking responsibilities, it would not

---

[7] In the *Miranda* context the Court has enunciated a "public safety" exception to the requirement of *Miranda* warnings that would apply regardless of the "subjective motivation of the arresting officer." *New York v. Quarles,* 467 U.S. 649, 656 (1984).

[8] The community caretaking function that in part justifies an inventory search is particularly compelling here, as it was in *Cady v. Dombrowski,* 413 U.S. 433 (1973), where the potential danger to the public that weapons and drugs present is involved.

alter or diminish them.[9] Nor does the existence of a departmental, on-site inventory policy (or a police intent to effectuate one) confer upon an arrestee any additional privacy protection. The permissible scope of an inventory search would be no different with or without such a policy.

Surely, it is neither desirable nor feasible for police departments to reduce to rule and regulation every aspect of their community caretaking function. More important, the constitution contains no such command. *See Illinois v. Lafayette,* 462 U.S. at 647. And, while an inventory policy may help to ensure that the search undertaken would be "limited in scope to the extent necessary to carry out the caretaking function"; *South Dakota v. Opperman,* 428 U.S. at 375; it is neither essential to, nor sufficient alone to establish a reasonable inventory search.

In other contexts the Court has considered warrantless administrative searches reasonable without the specific requirement that they be conducted pursuant to formalized policies. *See e.g., Bell v. Wolfish,* 441 U.S. 520, 558-60 (1979) (prison searches; "[c]ourts must consider the scope of the particlar intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted"); *Michigan v. Tyler,* 436 U.S. 499, 509-10 (1977) (post fire, administrative search to determine cause of fire judged by reasonableness standard). These cases are an implicit recognition that the reasonableness of government action that intrudes on a privacy interest does not depend upon the existence of formalized policies but upon the facts and circumstances surrounding the particular government action.

Thus, if upon the lawful seizure of a motor vehicle the police may be responsible for its contents, and if the obligations of their

---

[9] Even jurisdictions that strictly require evidence that an inventory policy exists make an exception where, as here, there is reason to believe a vehicle contains weapons or drugs. *See United States v. Hellman,* 556 F.2d 442, 444 n.4 and accompanying text (9th Cir. 1977).

office require them to protect against the threat to health and safety the contents of the vehicle may pose, it is difficult to understand how the justification for a search that is an objectively reasonable response to these concerns can be made to depend upon the existence of formalizd policies and their conscious implementation by the police.

c. Nor should the specter of pretextual police searches detain the Court. The Constitution does not create a code of ethics for police officers. *See Moran v. Burbine,* — U.S. —, 106 S. Ct. 1135, 1142 (1986). It is fair to say that each of the constitutional powers of the police is subject to abuse through pretextual use. But, as the rule of *Scott* acknowledges, while the Fourth Amendment creates an objective zone of privacy into which the government may not unjustifiably intrude, the intrusion occurs, if at all, not by thought but by action. *Scott v. United States,* 436 U.S. 128, 136-38 (1978). Unlike the commission of a crime, which ordinarily involves the coalescence of both an evil intent and a prohibited act, the violation of the Fourth Amendment requires only a prohibited act. The subjective intent of an officer can neither form the basis of a Fourth Amendment violation nor ameliorate one that has occurred.[10]

---

[10] To be sure, police motives can affect the remedy once a Fourth Amendment violation has been found. *See Scott v. United States,* 436 U.S. at 139 n.13; *Brown v. Illinois,* 442 U.S. 590, 603-604 (1975) (flagrancy of unlawful police action is factor in deciding whether subsequently obtained evidence is tainted). But such an inquiry occurs not to determine whether the Constitution has been violated but whether the deterrent object of the Exclusionary Rule would be advanced by suppression. Even in this context, however, inquiry into the subjective motives of police is limited. *See United States v. Leon,* 468 U.S. 897, 919-20 n.20, 922-23 n.23 (1983) ("we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant"; "our good-faith inquiry is confined to [an] objectively ascertainable question . . .").

In short, the Fourth Amendment does not protect against constitutionally impure police motives.[11]

d. Nevertheless, attempts to reconcile this Fourth Amendment principle with this Court's references in *Opperman* to standard inventory policies and pretextual searches has led to contrary results in state and federal courts. *Compare, e.g., United States v. Hellman,* 556 F.2d 442, 443-4 (9th Cir. 1977) (in the absence of inventory policy and intent to effectuate it, search unlawful), *and State v. Hudson,* 390 A.2d 509, 511 (Me. 1979) (absence of inventory policy rendered search unlawful), *with United States v. Prescott,* 599 F.2d 103, 105-106 (5th Cir. 1979) (existence of inventory policy and an intent to effectuate it not necessary to valid inventory search); *United States v. Hall* 565 F.2d 917, 922 (5th Cir. 1978) (failure to fill out inventory form and officers' desire to find illegal items does not vitiate otherwise valid inventory search); *State v. Walker,* 579 P.2d 1091, 1098 (Ariz. 1978) *(en banc)* (inventory search will be found to be proper not because "subjective motives of the police were simplistically pure" but because search was "reasonable under the circumstances"); *Mayhood v. State,* 669 S.W.2d 873, 874 (Tex. App., 13 Dist. 1984, pet. ref'd) (that police expected to find contraband during inventory does not invalidate search).[12] To the extent that the cases requiring both an inventory policy and a police intent to effectuate it exceed constitutional commands,

---

[11] This Court only recently granted a state petition for certiorari in a case that raises the constitutional significance of a pretextual arrest and search. *State v. Blair,* 691 S.W.2d 259 (Mo. 1985), *cert. granted,* 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (No. 85-303).

[12] The State advances the rule adopted by the Arizona Court of Appeals; *Matter of One 1969 Chev.* B-*Door, Etc.,* 121 Ariz. 532, 591 P.2d 1309 (Ct. of Ap., Div. 1, Dep't B 1979); for deciding whether an inventory search is lawful: "(1) The law enforcement officials must have lawful custody or possession of the automobile and (2) the objective facts indicate that an inventory search was reasonable under the circumstances." *Id.* at 535.

the cost to society of this misapplication of the Fourth Amendment is tremendous, for many courts have adopted that view. *See United States v. Jackson,* 529 F. Supp. 1047, 1055 nn.11, 12 (D. Md. 1981).

Because the Fourth Amendment embodies an objective standard of reasonableness that is unaffected by police motivation, or the existence of police rules and regulations, and because the question raised is of particular nation-wide significance, the petition should be granted and the question presented reviewed.

2. In *New York v. Belton,* 453 U.S. 545 (1981), this Court held that, "when a policeman has made a lawful custodial arrest of the occupant of the automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. The rule depends not upon whether at the time of the search the passenger compartment was in fact within the physical reach of the arrestee; rather, the rule is a straight-forward standard based upon the generalization that the passenger compartment of an automobile of which the arrestee was a recent occupant is " 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " *Id.* at 460 (*quoting Chimel v. California,* 395 U.S. 752, 763 (1969)). Thus, in *Belton* the search was sustained notwithstanding that the arrested occupants of the vehicle were at the time of the search outside the vehicle and placed in " 'four separate areas of the Thruway . . . so they would not be in physical touching area of each other.' " *Id.* at 456.

While *Belton* focused on the scope of an auto search incident to the arrest of passengers who had been removed from the vehicle, this case presents the question of when an auto search is "contemporaneous" with an arrest, considering both geographic and temporal factors. The state supreme court concluded that, although the search was at its inception valid as a search incident to the respondent's arrest, it became invalid the moment the respondent was, during the search, removed from the scene of the arrest in a cruiser. App. at 16a-17a.

It is now clear that, to be incident to a lawful arrest a search must be "substantially contemporaneous" with the arrest. *See Shipley v. California,* 395 U.S. 818, 819 (1969); *Stoner v. California,* 376 U.S. 483, 486 (1964). The State contends that a search commenced while the suspect is at the scene of the arrest is "substantially contemporaneous" with the arrest notwithstanding that he is during the course of the search taken from the scene.[13] Any other rule would lead to uncertainty and confusion at the roadside scene of the arrest and could exacerbate an already volatile situation.

Any arrest presents the potential for violence; when it occurs on the side of a public highway the danger posed by the arrest extends not only to the police but to members of the public. It would make little sense to fashion a "search incident to arrest" rule that encourages police to keep a suspect unnecessarily at the roadside scene of his arrest so that they may lawfully complete a search of his automobile. Surely the danger posed by the presence of the arrestee in close proximity to the vehicle he was operating, which may be a repository of weapons, should not be prolonged.

Nor, of course, should the rule authorizing the search of an automobile incident to the arrest of the operator extend beyond the circumstances that justify its existence. Yet, the need for a "single familiar standard" to guide police in the frequent roadside arrest setting, where there is little time for reflection, is much to be preferred over a "highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions." *New York v. Belton,* 543 U.S. at 458. Thus, while it is wholly appropriate to say that no search of an automobile can be incident to the arrest of its operator when the operator is removed from the scene, it is both irrational

---

[13] The State agrees that an automobile search is not incident to an arrest when it begins after the suspect has been removed from the scene. *See Preston v. United States,* 376 U.S. 364, 368 (1964).

and confusing to say that a brief search of an automobile, lawful at its inception, can become unlawful on the basis of a momentary event outside the control of the officer conducting the search.[14]

Because the Connecticut Supreme Court and other courts throughout the country are in need of guidance in applying the substantial contemporaneity component of the "search incident" doctrine in the context of automobile searches; *see generally* 1 W. Ringel, *Searches and Seizures, Arrests and Confessions,* § 12.5 (1985); this Court should grant the petition and review the question presented.

[14] There was no claim or suggestion in this case that the search of the respondent's automobile was unnecessarily prolonged or intrusive.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

THE STATE OF CONNECTICUT
Petitioner

BY: JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

With whom on the Brief:

JOHN J. KELLY
Chief State's Attorney

JOHN T. REDWAY
State's Attorney

JUDITH ROSSI
Deputy Assistant State's Attorney

MARY K. MILLER
Legal Intern

September, 1986

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent.

APPENDIX
OF THE
PETITIONER

STATE OF CONNECTICUT *v.* EARL BADGETT (12142)

PETERS, C. J., HEALEY, SHEA, SANTANIELLO and CALLAHAN, Js.

Convicted following a conditional plea of nolo contendere to a substitute information charging him with the crime of illegal possession and transportation of heroin with intent to sell, the defendant appealed to this court. *Held:*

1. The trial court did not err in accepting the defendant's plea of nolo contendere; the record of his plea canvass demonstrated that his plea was knowingly, voluntarily and intelligently made.

(Two justices dissenting)

2. A warrantless search of the automobile which the defendant was driving at the time of his arrest could not be constitutionally validated under

any of the exceptions to the warrant requirement; the case was, however, remanded to the trial court for a further determination of whether the material seized during that search could be properly admitted under the "inevitable discovery" exception to the exclusionary rule.

"Inevitable discovery" exception, discussed.

Argued April 9—decision released July 8, 1986

Substitute information charging the defendant with the crime of illegal possession and transportation of heroin with intent to sell, brought to the Superior Court in the judicial district of Middlesex and presented to the court, *Spallone, J.*, on a plea of nolo contendere; judgment of guilty, from which the defendant appealed to this court. *Remanded for further proceedings.*

Martin Zeldis, assistant public defender, with whom, on the brief, was *Joette Katz,* public defender, for the appellant (defendant).

Judith Rossi, deputy assistant state's attorney, with whom, on the brief, were *John T. Redway,* state's attorney, and *James G. Clark,* deputy assistant state's attorney, for the appellee (state).

SHEA, J. The defendant, Earl Badgett, has appealed from his conviction upon a conditional plea of nolo contendere to a substitute information charging him with illegal possession and transportation of heroin with intent to sell in violation of General Statutes (Rev. to 1981) § 19-480 (a).[1] The defendant has raised two claims

[1] General Statutes (Rev. to 1981) § 19-480 (a) [presently § 21a-277 (a)] provides: "(a) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance, other than marihuana, or a narcotic substance except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than three thousand dollars or be both fined and imprisoned and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than five thousand dollars, or be both fined and imprisoned."

of error: (1) that the trial court failed properly to ascertain whether his nolo contendere plea was knowingly, voluntarily and intelligently made and (2) that the trial court erroneously denied his motion to suppress evidence seized as a result of the warrantless search of the automobile that he was driving at the time of his arrest.[2] We find no error in the trial court's acceptance of the defendant's plea. Although we conclude that the evidence was illegally seized from the automobile, we remand the case to the trial court for further proceedings to consider whether the evidence would have been inevitably discovered legally.

The state recited the following factual basis for the defendant's plea at the time it was accepted by the trial court: On March 14, 1982, the defendant, driving a blue Cadillac Eldorado, was stopped for speeding while traveling north on Interstate 91 in Middletown by state trooper Peter Naples. After speaking with the defendant and obtaining his operator's license, Naples returned to his police cruiser to prepare the speeding ticket. He was then informed by the police dispatcher that there were outstanding arrest warrants for the defendant. The defendant was arrested pursuant to

[2] On April 11, 1984, the defendant attacked the validity of his plea by a habeas corpus petition alleging the ineffective assistance of counsel and an improper canvass. On May 31, 1985, the trial court, *Kline, J.*, granted the petition on the ground of improper canvass only. The state, after receiving permission from the court, appealed the decision to the Appellate Court. The state then filed a motion for rectification with the trial court pursuant to Practice Book § 3082. Because of the pendency of this appeal, the trial court, *Kline, J.* sua sponte, vacated its earlier order that the plea canvass was improper. The defendant filed a motion to review with the Appellate Court. After the appeal was transferred to this court, we denied the motion to review. The appeal was then withdrawn. Our resolution of the first issue on appeal has no effect on the right of the defendant to pursue his unresolved habeas claim because our review of the plea canvass is based solely on the record before us. In the habeas proceeding the defendant is free to go beyond the transcript of the plea proceeding to show that he did not understandingly waive his right to a jury trial. *State* v. *Martin*, 197 Conn. 17, 25-26, 495 A.2d 1028 (1985).

these warrants and was removed from his vehicle. A search of the vehicle was then conducted which uncovered a black bag containing a number of glassine envelopes holding a white powdery substance.

After laboratory tests established that the white substance in the black bag was heroin, the defendant was arrested on April 15, 1982, on charges of possession of narcotics, in violation of General Statutes (Rev. to 1981) § 19-481 (a) and possession of narcotics with intent to sell by a non-drug dependent person, in violation of General Statutes (Rev. to 1981) § 19-480a (a). By a substitute information dated June 22, 1982, the state abandoned the simple possession count and charged the defendant only with possession with intent to sell by a non-drug dependent person. The defendant pleaded not guilty and elected a jury trial.

On April 25, 1982, the defendant filed a motion to suppress the heroin seized during the warrantless search of the vehicle he was driving. On February 17, 1983, after a full evidentiary hearing, the trial court denied the defendant's motion to suppress. On the same date, a second substitute information was filed, charging the defendant with illegal possession of heroin with intent to sell in violation of General Statutes (Rev. to 1981) § 19-480 (a), to which the defendant entered a conditional plea of nolo contendere, specifically reserving the right to appeal the court's denial of his motion to suppress. General Statutes § 54-94a; *State* v. *Madera*, 198 Conn. 92, 98–99, 503 A.2d 136 (1985). On March 21, 1983, the trial court sentenced the defendant to fifteen years imprisonment.

I

The defendant first claims that his plea of nolo contendere was obtained in violation of due process because the trial court failed to ascertain whether the

plea was knowingly, voluntarily and intelligently made.[3] Specifically, the defendant asserts that the plea canvass was inadequate because the trial court did not advise him of his rights in accordance with the strictures of Practice Book §§ 711[4] and 712[5] and also in accordance with federal constitutional principles as enunciated in *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Neither the Practice Book violations nor the constitutional claims were raised by the defendant by a motion to withdraw his plea before sentence was imposed by the trial court.

[3] Although General Statutes § 54-94a allows a defendant to plead nolo contendere conditional on the right to appeal, the denial of either a motion to suppress based on search and seizure grounds, or a motion to dismiss, the defendant can properly attack the validity of his conditional plea on appeal on the basis that it was not knowingly, voluntarily and intelligently made. See *State* v. *Madera*, 198 Conn. 92, 107–108, 503 A.2d 136 (1985).

[4] "[Practice Book] Sec. 711. — —ADVICE TO DEFENDANT

"The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he fully understands:

"(1) The nature of the charge to which the plea is offered;

"(2) The mandatory minimum sentence, if any;

"(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

"(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

"(5) The fact that he has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he has the right to be tried by a jury or a judge and that at that trial he has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself."

[5] "[Practice Book] Sec. 712. — —INSURING THAT THE PLEA IS VOLUNTARY

"The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. The judicial authority shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting authority and the defendant or his counsel.

Practice Book § 720; *State* v. *James,* 197 Conn. 358, 360, 497 A.2d 402 (1985); *State* v. *Martin,* 197 Conn. 17, 495 A.2d 1028 (1985).

The acceptance of a plea of nolo contendere is governed by federal constitutional standards as well as state rules of practice. " 'Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination. . . [s]econd, is the right to trial by jury . . . [t]hird, is the right to confront one's accusers.' *Boykin* v. *Alabama,* [supra]. Further, under the Connecticut rules of practice, a trial judge must not accept a plea of nolo contendere without first addressing the defendant personally and determining that the plea is voluntarily made under Practice Book § 712 and that the defendant fully understands the items enumerated in Practice Book § 711. *State* v. *Godek,* 182 Conn. 353, 357, 438 A.2d 114 (1980), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981); *State* v. *Battle,* 170 Conn. 469, 473, 365 A.2d 1100 (1976); *State* v. *Bugbee,* 161 Conn. 531, 533, 290 A.2d 332 (1971)." *State* v. *Martin,* supra, 22–23.

Ordinarily, the defendant's failure to raise a timely claim of error before the trial court renders the claim unreviewable on appeal. Practice Book §§ 854, 3063. "Only in the most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." *State* v. *Evans,* 165 Conn. 61, 69, 327 A.2d 576 (1973). We have recognized, however, as an "exceptional circumstance" within this doctrine, certain claims involving colorable deprivations of fundamental constitutional rights. *State* v. *Roma,* 199 Conn. 110, 113, 505 A.2d 717 (1986); *State* v. *Evans,* supra, 70.

To the extent that the defendant's claim implicates the failure of the trial court to apprise him of the constitutionally mandated requirements for a valid plea, as delineated in *Boykin,* his claim is properly reviewable despite the absence of a timely motion to withdraw the plea. *State* v. *Amarillo,* 198 Conn. 285, 313 n.16, 503 A.2d 146 (1986). While the federal constitution requires that the record of the plea canvass indicate the voluntariness of any waiver of the three core constitutional rights delineated in *Boykin,* it does not require that the trial court go beyond these "constitutional minima." *United States* v. *Dayton,* 604 F.2d 931, 935 n.2 (5th Cir. 1979) (en banc). A defendant can voluntarily and understandingly waive these rights without literal compliance with the prophylactic safeguards of Practice Book §§ 711 and 712. Therefore, although the Practice Book provisions were designed to reflect the principles embodied in *Boykin; State* v. *Godek,* 182 Conn. 353, 357, 438 A.2d 114 (1980), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981); *Blue* v. *Robinson,* 173 Conn. 360, 373, 377 A.2d 1108 (1977); precise compliance with the provisions is not constitutionally required. Thus, our analysis will focus on whether the federal constitutional principles of *Boykin* were satisfied rather than on meticulous compliance with the provisions of the Practice Book.

Under *Boykin,* in order for a plea to be knowingly, voluntarily and intelligently made, a trial court is required to advise a defendant that his plea operates as a waiver of three fundamental constitutional rights—jury trial, confrontation and self-incrimination. The defendant in this case does not claim that the trial court neglected to advise him concerning the right to confrontation, as the record expressly indicates that this condition was satisfied.[6] The defendant's principal con-

[6] "The Court: Do you understand . . . that you are giving up your right to confront the witnesses against you?

"The Defendant: Yes, sir."

stitutional claim is that the court did not inform him of his right to a trial by jury. During the plea canvass, the trial court asked the defendant if he understood that "you are giving up your right to trial at this present time?" Although the defendant responded affirmatively to that inquiry, he claims that the trial court's failure to utilize the term "jury trial" prevented him from making a knowing waiver of the right and, therefore, rendered his plea constitutionally defective. While we do not condone the court's failure expressly to reference the right to a "jury" trial, we conclude that the inquiry was constitutionally sufficient under the circumstances of this case.

At the time of his initial plea of not guilty to both the original and the first substituted informations, the defendant must have been advised of his right to a trial by either the court or a jury, because he elected a jury trial. We cannot imagine that the slight differences between the charges in the initial information and the second substituted information could reasonably have led the defendant to presume that his right to a jury trial would be altered. We also find it of no moment that the judge who presided at the time the original not guilty plea was entered did not also accept the defendant's plea of nolo contendere or that the initial plea was entered some ten months before the nolo contendere plea. The defendant's trial by jury was scheduled to begin at the time the defendant elected to withdraw his earlier plea of not guilty. The defendant, through counsel, informed the court that he desired to "withdraw the prior pleas and elections on the files as they stand and . . . [enter] a conditional plea of nolo contendere." The court's response to this request, "the prior pleas and *elections* are withdrawn and vacated," clearly refers to the defendant's withdrawal of his election for a jury trial. Although *Boykin* requires that relinquishment of the right to a trial by jury must be evident

and cannot be presumed from a "silent" record, we conclude that the trial court's express mention of waiver of the right to *trial,* combined with the defendant's prior election for a jury trial, his experience with criminal proceedings and apparently adequate representation by counsel, satisfy the constitutional requirement.

The defendant's secondary claim of a constitutional violation, conceded at oral argument to be his weaker claim, involves the trial court's failure to advise him of his right to be free of compulsory self-incrimination. During the plea canvass the trial court asked the defendant if he realized "that you are giving up your right to silence at this point." The defendant responded affirmatively. The trial court used the more common vernacular, rather than the precise language of *Boykin.* Literal compliance, however, is *not* constitutionally required. See *State* v. *Godek,* supra, 353. This court, indeed, has in the past referred to a defendant's right to be free of compulsory self-incrimination as the right "to remain silent." *State* v. *Deboben,* 187 Conn. 469, 471–72, 446 A.2d 828 (1982). In fact, a defendant might better understand his right against compulsory self-incrimination by the use of the term "right to remain silent." See *State* v. *Lopez,* 197 Conn. 337, 348, 497 A.2d 390 (1985); *State* v. *Suggs,* supra. Although the court did not specifically advise the defendant that he had the right not to be compelled to incriminate himself, the substance of that right was sufficiently conveyed. *United States* v. *Caston,* 615 F. 2d 1111, 1115 (5th Cir. 1980).[7]

[7] We also reject the defendant's contention that the trial court's failure to inform him of his right to continued assistance of counsel in the event of a trial rendered his nolo contendere plea defective. See Practice Book § 711 (5). Although this right is not included within the requirements of *Boykin* v. *Alabama,* 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), we evaluate the claim because it does involve the defendant's knowing waiver of his sixth amendment right to counsel. *Carnley* v. *Cochran,* 369 U.S. 506, 513, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962). The defendant was

II

The defendant also claims that the warrantless search of the black bag and seizure of heroin violated his rights under the fourth and fourteenth amendments to the United States constitution. The trial court denied the defendant's motion to suppress based on three exceptions to the requirement that all searches executed by police be conducted with a warrant. We conclude that the warrantless search was unconstitutional.

Some additional facts are necessary to the disposition of this claim: After state trooper Naples stopped the defendant for speeding and acquired his driver's license, he returned to his vehicle to prepare the ticket. While in his cruiser, parked twenty-five feet behind the defendant's vehicle, Naples observed that the defendant was moving around in the car, leaning towards the middle of the front seat and bending down. Because of these "unusual" movements, the trooper contacted state police headquarters in order to receive information relating to the defendant's license and possible suspension. He was informed by the dispatcher that there were outstanding arrest warrants for the defendant for various drug and weapons charges. He was also advised

represented by counsel throughout the pretrial proceedings, including the hearing on the motion to suppress and the proceeding in which the defendant withdrew his earlier plea and entered his nolo contendere plea. See *State* v. *Suggs*, 194 Conn. 223, 226–27, 478 A.2d 1008 (1984). The trial court inquired of the defendant whether he understood the nature and import of the conditional nolo contendere plea. An examination of the record establishes that the decision to enter a conditional nolo contendere plea was a tactical one and the product of discussion between the defendant and his counsel. It would "defy reality to suppose that [the defendant] had any doubts" about his continued right to assistance of counsel had he not elected to enter the conditional plea. *United States* v. *Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977); *State* v. *Suggs*, supra. Further, there is no indication that counsel intended to abandon the defendant if he persisted in his not guilty plea and went to trial. See *United States* v. *Saft*, supra.

that the defendant was not the registered owner of the Cadillac. An additional trooper was dispatched to the scene by headquarters in order to assist Naples. Naples was then advised that the warrants for the defendant's arrest were still active and that the defendant might have in his possession one or two sawed-off shotguns. After the backup officer, Karl Kiernan, arrived on the scene, the troopers cautiously approached the defendant's vehicle and instructed him to exit the car. The defendant complied with the request. The troopers arrested the defendant and conducted a "pat-down" search of the defendant's person but discovered nothing. Because of his large size the troopers were unable to handcuff the defendant behind his back, which was the departmental policy, and, therefore, had to handcuff him in front of his body. The defendant was advised of his rights and the charges against him, placed in the front passenger seat of Naples' cruiser and secured by the seat belt and shoulder harness.

The troopers then returned to the Cadillac in order to search it for narcotics and weapons. Naples searched the front seat of the vehicle from the driver's door, focusing on the area where the defendant had been making the unusual movements. He observed a blue windbreaker jacket partially hidden underneath the seat. When he pulled it out, a black zippered bag fell out of the windbreaker onto the floor of the car. The bag was approximately ten inches long, two inches wide and three to four inches high. Naples did not open the bag but did feel the outside and suspected that it contained narcotics or perhaps a handgun. He left the bag on the front seat of the defendant's vehicle and discontinued his search. He then returned to his vehicle and summoned a police wrecker in order to tow the defendant's vehicle to state police headquarters. Without informing his fellow officer, Kiernan, who was still

searching the defendant's vehicle, that he was leaving the scene or that he had discovered the black bag, Naples left the scene with the defendant.

At approximately the same time that Naples departed from the scene with the defendant, trooper Kiernan, who had been searching the rear of the automobile, noticed the black bag in the front seat. Kiernan first felt the bag in order to determine whether it contained a weapon, and then opened it. Immediately after Kiernan discovered the heroin in the bag he noticed that trooper Naples and the defendant were "driving off." Kiernan did not continue to search the vehicle. Shortly thereafter, the police wrecker arrived and brought the vehicle to headquarters. Kiernan had removed the black bag and its contents and brought it with him to headquarters. Pursuant to a search warrant, the automobile was searched at the police station. The search revealed no weapons or narcotics.

The Fourth Amendment to the United States constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. "[A] search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' " *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), quoting *Katz* v. *United States,* 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454–55, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971); see *Stoner* v. *California,* 376 U.S. 483, 486, 84 S. Ct. 889, 11 L. Ed. 2d 856, reh. denied, 377 U.S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303 (1964); *State* v. *Zindros,*

189 Conn. 228, 237, 456 A.2d 288 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984). Three recognized exceptions to the warrant requirement, upon which the trial court relied, are (1) where searches have been undertaken "incident to a lawful custodial arrest"; *New York* v. *Belton,* 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *United States* v. *Robinson,* 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *Chimel* v. *California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *State* v. *Shaw,* 186 Conn. 45, 48, 438 A.2d 872 (1982); (2) where there is probable cause to believe that a motor vehicle contained contraband or evidence pertaining to a crime; *United States* v. *Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d. 572 (1982); *Arkansas* v. *Sanders,* 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979); *Coolidge* v. *New Hampshire,* supra, 455; *State* v. *Januszewski,* 182 Conn. 142, 152–54, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1980); and (3) where the search has been conducted in order to "inventory" personal property lawfully taken into police custody. *Illinois* v. *Lafayette,* 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *Michigan* v. *Thomas,* 458 U.S. 259, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982); *South Dakota* v. *Opperman,* 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *State* v. *Gasparro,* 194 Conn. 96, 107, 480 A.2d 509 (1984), cert. denied, U.S. , 106 S. Ct. 90, 88 L. Ed. 2d 74 (1985). These exceptions "have been jealously and carefully drawn"; *Jones* v. *United States,* 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958); and the burden is on the state to establish the exception. *Coolidge* v. *New Hampshire,* supra, 455; *State* v. *Zindros,* supra, 237. We will separately address each of the exceptions to determine their applicability to the instant case.

A

The principal basis on which the state supports the warrantless search of the automobile is that the search

was incident to the lawful custodial arrest of the defendant. In *Chimel* v. *California,* supra, the United States Supreme Court held that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area, whether or not there is probable cause to search. The court recognized that searches incident to arrests have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape . . . ." and the need to prevent the concealment or destruction of evidence. Id., 763. In *New York* v. *Belton,* supra, 461, the court applied this concept to an automobile search, holding that a lawful custodial arrest justifies a contemporaneous search of the entire passenger compartment of an automobile, whether or not the arrestee actually had control over the area.[8] In order to establish a straightforward rule for searches involving automobiles, the court applied *Chimel* in light of the generalization that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' *Chimel* [v. *California,* supra]." *New York* v. *Belton,* supra, 460.

In *New York* v. *Belton,* supra, an automobile was stopped by a state policeman for traveling at an excessive rate of speed. The officer examined the automo-

[8] In *New York* v. *Belton,* 453 U.S. 454, 461-62, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the court further reasoned that police may examine the contents of any containers found within the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."

bile registration and determined that none of the four occupants of the vehicle was related to the owner. The officer also smelled an odor of burnt marihuana and noticed an envelope on the floor of the vehicle that contained marihuana. He directed the men to get out of the vehicle and placed them under arrest for the unlawful possession of marihuana. After conducting a "pat-down" search of each of the men, he ordered them to remain in four separate areas of the highway so they would not be able to reach each other. The officer then searched the passenger compartment of the vehicle and found a jacket belonging to Belton. The officer unzipped one of its pockets and discovered cocaine. The Supreme Court concluded that the search which yielded the cocaine was proper as incident to the lawful arrest of the defendant.

Here the defendant does not claim that his arrest was invalid, as it was clearly made pursuant to outstanding arrest warrants, but claims that the search of the black bag was not incident to his arrest because he was no longer at the scene of the arrest at the time the bag was searched by officer Kiernan. We agree that the search was not incidental to the arrest.

The Supreme Court's decision in *Belton* articulated the scope of a search of an automobile incident to a lawful custodial arrest of its occupants. The court fashioned a rule, "easily applied, and predictably enforced"; *United States* v. *Robinson*, supra, 235; in order to provide clear guidance to police officers "who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." Id., 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213–14, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). *Belton* established this standard based upon a generalization that the interior of a car is always within the immediate control of an arrestee who has recently been in the car.

The state contends, therefore, that because the decision in *Belton* was an attempt to eliminate on the scene confusion of police officers with respect to the scope of their right to search an automobile, we should refrain from retrospectively evaluating the probability that the defendant could reach into the passenger compartment of the car. We agree with the state that the competing interests of law enforcement and personal privacy are better served if precise rules of police conduct are established which may be routinely followed in certain situations. Therefore we ordinarily will refuse to evaluate whether or not an individual arrested while in an automobile actually had access to the passenger compartment at the time of the search. We note that the search in *Belton* occurred after the four occupants of the automobile had been removed from the car, patted down, placed under arrest and separated on the highway so that none of them could have actually *reached* the jackets in the back seat of the car. Other courts have applied *Belton* in analogous situations where the arrestee seemingly had no opportunity to gain access to the passenger compartment of the automobile. *United States* v. *Cotton,* 751 F.2d 1146 (10th Cir. 1985) (*Belton* applicable even though defendant outside car and handcuffed); *Traylor* v. *State,* 458 A.2d 1170 (Del. 1983) (defendant in handcuffs); *State* v. *Valdes,* 423 So. 2d 944 (Fla. App. 1982) (defendant seated in police car); *State* v. *Hopkins,* 163 Ga. App. 141, 293 S. E.2d 529 (1982) (defendant seated in police car); see 2 Lafave, Search and Seizure, Search Incident to Arrest, 1986 Pocket Part § 7.1, p. 224 n. 46.12.

We refuse, however, to extend the "fiction" that the passenger compartment is *always* within reach of the arrestee; *New York* v. *Belton,* supra, 467 (Brennan, J., dissenting); to circumstances, as here, where the defendant is no longer at the scene of the arrest when the warrantless search was undertaken. It is undisputed

that in this case the defendant was strapped and handcuffed in the police cruiser leaving the scene when the heroin was discovered by officer Kiernan. Because *Belton* does no more than apply *Chimel* v. *California* to a "particular and problematic" context, and "in no way alters the fundamental principles established in the *Chimel* case . . ." Id., 460 n.3; we hold that the right of a police officer to search the vehicle ceases the instant the arrestee departs the scene because the arrestee's removal forecloses any possibility that he could reach for an article within the vehicle. See *United States* v. *Chadwick,* 433 U.S. 1, 16, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); *Preston* v. *United States,* 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964). Although *Belton* appears to have removed the necessity for factual analysis in each case of the actual likelihood that a person arrested may be able to obtain a weapon or destroy evidence contained in the passenger compartment of his vehicle, we construe it to allow a warrantless search of a vehicle incident to a lawful custodial arrest only while the arrestee remains at the scene of the arrest at the time the search is conducted. The warrantless search in this case was not constitutionally valid as incident to the arrest of the defendant.

B

The second theory put forward by the state to justify the warrantless search of the automobile is that the police may make a warrantless search of an automobile in transit whenever they have probable cause to do so. The justification for this so-called "automobile exception" is twofold: (1) the inherent mobility of an automobile creates "exigent circumstances," and (2) the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. *California* v. *Carney,* 471 U.S. , 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985); *South Dakota* v. *Opperman,* supra, 367; *Chambers* v. *Maroney,* 399 U.S.

42, 90 S. Ct. 1975, 26 L. Ed. 2d 419, reh. denied, 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94 (1970); *Carroll* v. *United States,* 267 U.S. 132, 153, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *State* v. *Kolinsky,* 182 Conn. 533, 538, 438 A.2d 762 (1980), cert. denied, 451 U.S. 973, 101 S. Ct. 2054, 68 L. Ed. 2d 354 (1981). This exception to the warrant requirement demands that the officers have probable cause to believe that the vehicle contains contraband. *Carroll* v. *United States,* supra, 153–54. The probable cause determination must be based on objective facts that could have justified the issuance of a warrant by a neutral magistrate at the time the search was made. *United States* v. *Ross,* supra, 808.

This automobile exception to the warrant requirement applies only to searches of vehicles that are supported by probable cause. The absence of probable cause, despite the exigency created by the ready mobility of automobiles and the lesser expectation of privacy in them, will render any warrantless search unreasonable. *Chambers* v. *Maroney,* supra, 51; *State* v. *Federici,* 179 Conn. 46, 53–54, 425 A.2d 916 (1979). " 'Probable cause to search exists if (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . *and* (2) there is probable cause to to believe that the items sought to be seized will be found in the place to be searched.' (Emphasis in original; citations omitted.) *State* v. *DeChamplain,* [179 Conn. 522, 528–29, 427 A.2d 1338 (1980)]." *State* v. *Delmonaco,* 194 Conn. 331, 337, 481 A.2d 40, cert. denied, U.S. , 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984).

The state claims that there was probable cause to search the defendant's vehicle for dangerous weapons. We disagree. The factual information available to the state at the time the officers conducted the search of

the Cadillac was inadequate to establish probable cause that weapons would be found in the vehicle. The officers were aware of the following facts prior to their search of the automobile for evidence: the vehicle had been stopped for speeding; there were outstanding arrest warrants for weapons charges; the defendant had been observed making "a lot of unusual movements" in the car; and they were informed by the police dispatcher, the basis for his assertion being the reported belief of the Bridgeport police department, that the defendant might have shotguns in his car. Although a police officer is certainly entitled to utilize his training and experience in ascertaining probable cause; see *Texas* v. *Brown,* 460 U.S. 730, 743–44, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1984); we cannot conclude that these factors alone are sufficient to "warrant a man of reasonable caution in the belief" that weapons would be found in the car. *Carroll* v. *United States,* supra, 162; see *State* v. *Schoenbneelt,* 171 Conn. 119, 123, 368 A.2d 117 (1976).[9] Clearly, the defendant's citation for speeding has little bearing on the probable cause determination. The existence of arrest warrants, albeit on weapons charges, does not indicate probable cause to search for weapons because these warrants alone provide no reasonable basis for the officers to conclude that weapons would be found in the vehicle. The suspicion of the Bridgeport police that the defendant might have weapons in the vehicle does not amount to probable cause. Finally, the fact that the defendant was making furtive movements could very well be explained by his anxiety over being stopped and could not reason-

[9] The state also argued that officer Kiernan had probable cause to search the black bag for handguns. The officers did not testify that the black bag had any "distinctive character" that raised any reasonable suspicion that there were weapons within it. *Texas* v. *Brown,* 460 U.S. 730, 744, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1984). In fact, trooper Kiernan testified that, he "didn't believe that" the bag contained a firearm.

ably have allowed the officers to conclude that there were weapons in the car. The officers did not have probable cause to search the vehicle.

C

The state also contends that the warrantless search and seizure of the contents of the black bag were constitutionally permissible in order to inventory the contents of the vehicle. We summarily reject this contention. In *South Dakota* v. *Opperman,* supra, the United States Supreme Court held that a warrant was not necessary where the purpose of the search was to inventory the contents of an impounded vehicle. When "vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents." Id., 369. The court concluded that "inventories pursuant to standard police procedures are reasonable," and that evidence obtained as a result of a valid procedure is admissible against the defendant if the inventory "process is aimed at securing or protecting the car and its contents." Id., 373.

Although we have recognized the validity of departmentally authorized inventory searches; *State* v. *Gasparro,* supra, 108; the state, as is its burden, did not offer evidence of any police department practice for inventory searches to be conducted on the highway by field officers. Further, it is clear that the officers' purpose in searching the vehicle at the scene was to investigate and not to inventory the contents. The fact that no lists of property were made and that the officers discontinued their search immediately after discovering the contraband indicates that the search was not undertaken to inventory the contents of the vehicle. See *State* v. *Johnson,* 183 Conn. 148, 438 A.2d 851 (1981); *State* v. *Murphy,* 6 Conn. App. 394, 401 n.8, 505 A.2d 1251 (1986). In fact, the officers did not tes-

tify that the purpose of their search was to conduct an inventory. The search cannot be constitutionally validated under the "inventory search" exception to the warrant requirement.

III

Our conclusion that the warrantless search of the vehicle did not fall within an established exception to the warrant requirement does not require us to exclude the evidence unlawfully seized from the vehicle the defendant was driving. Under the exclusionary rule, the illegally seized heroin would be inadmissible at trial unless one of the exceptions to the rule applied. *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Although the argument was not raised by the state on appeal,[10] evidence illegally seized can be properly admitted under the "inevitable discov-

[10] The subject of the applicability of the "inevitable discovery" exception to the exclusionary rule, though briefed by neither party, was raised at oral argument upon inquiry by the court referring specifically to *Nix* v. *Williams,* 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). Just as this court may "in the interests of justice notice plain error not brought to the attention of the trial court"; Practice Book § 3063; this court may also consider grounds for affirming a judgment that may have been overlooked by counsel in an appeal to this court. "But where we do this it is not because the [party] has a right to have the question determined, but because, in the interest of the public welfare or of justice between individuals, we are of the opinion that it ought to be done." *Rindge* v. *Holbrook,* 111 Conn. 72, 75, 149 A. 231 (1930). "[T]his court is not limited in its disposition of a case to claims raised by the parties and has frequently acted sua sponte upon grounds of which the parties were not previously apprised." *Greenwood* v. *Greenwood,* 191 Conn. 309, 315, 464 A.2d 771 (1983). Where there is good reason, the court has ordered additional argument or briefing upon issues first raised sua sponte during oral argument. See *State* v. *Curcio,* 191 Conn. 27, 29, 463 A.2d 566 (1983); *State* v. *Powell,* 186 Conn. 547, 550, 442 A.2d 939, cert. denied, 459 U.S. 838, 103 S. Ct. 85, 44 L. Ed. 2d 80 (1982). Since we have concluded, however, that there must be further proceedings in the trial court to determine the applicability of the inevitable discovery rule under the circumstances of this case, the defendant will have a full opportunity to present in the trial court or in any subsequent appeal any claim, legal or factual, that the rule should not be followed in this case.

ery" exception to the exclusionary rule, recently adopted by the United States Supreme Court in *Nix* v. *Williams,* 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); see *United States* v. *Apker,* 705 F.2d 293, 306–307 (8th Cir. 1983); *United States* v. *Fisher,* 700 F.2d 780 (2d Cir. 1983); *United States* v. *Brookins,* 614 F.2d 1037 (5th Cir. 1980); *Wayne* v. *United States,* 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86 (1963). "[T]he 'vast majority' of all courts, both state and federal, recognize an inevitable discovery exception to the Exclusionary Rule." *Nix* v. *Williams,* supra, 441.

Under the inevitable discovery rule, evidence illegally secured in violation of the defendant's constitutional rights need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means. *Nix* v. *Williams,* supra, 444. To qualify for admissibility the state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the constitutional violation. *United States* v. *Cherry,* 759 F.2d 1196, 1205 (5th Cir. 1985); *United States* v. *Satterfield,* 743 F.2d 827, 846 (11th Cir. 1985). In *Nix* v. *Williams,* supra, 443, the Supreme Court observed that the operation of the exclusionary rule in situations where the police would have inevitably discovered the evidence by legal means already initiated would put the state in a worse position than it would have been in if no police misconduct had transpired. "Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place." Id., 447.

In light of *Nix* v. *Williams,* we remand the case to the trial court to determine whether the inevitable discovery doctrine is applicable under the circum-

stances of this case. See *New York* v. *Class,* U.S. , 106 S. Ct. 960, 969 n., L. Ed. 2d (1986). Of some significance in this regard was the testimony of officer Naples that, without informing his fellow officer, he had summoned a police wrecker to the scene in order to tow the defendant's vehicle back to headquarters. Among the factors to be considered are: (1) whether an inventory search would have been justified under the circumstances; (2) whether such a search would have been conducted according to standard state police operating procedures; and (3) whether a search pursuant to these procedures would have uncovered the heroin in the black bag. See *South Dakota* v. *Opperman,* supra; *State* v. *Gasparro,* supra.

We remand the case for further proceedings in accordance with this opinion.

In this opinion SANTANIELLO and CALLAHAN, Js., concurred.

PETERS, C. J., with whom HEALEY, J., joins, dissenting. With regret, I find myself in disagreement with the court's disposition of the issues raised by the defendant's conditional plea of nolo contendere. Because I believe that the trial court's canvass of the defendant's plea does not pass constitutional muster, I respectfully dissent.

The focus of my dissent from the majority opinion is a narrow one. We are all in agreement that, in this direct appeal from his conviction in accordance with his plea of nolo contendere, the defendant may challenge the constitutional implications of his plea canvass, even though he failed to raise such a claim of error in the trial court. *State* v. *Amarillo,* 198 Conn. 285, 313 n.16, 503 A.2d 146 (1986); *State* v. *Childree,* 189 Conn. 114, 119, 454 A.2d 1274 (1983); *State* v. *Godek,* 182 Conn. 353, 356, 438 A.2d 114 (1980), cert. denied,

450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981); *State* v. *Evans,* 165 Conn. 61, 70, 327 A.2d 576 (1973). We are equally in agreement that the constitutional determinants of a valid plea of nolo contendere require a showing, on the record, of a knowing and intelligent waiver of the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Boykin* v. *Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State* v. *Lopez,* 197 Conn. 337, 341-42, 497 A.2d 390 (1985); *State* v. *Childree,* supra, 119-20; *Blue* v. *Robinson,* 173 Conn. 360, 373, 377 A.2d 1108 (1977). Finally, we are all in agreement that the record adequately demonstrates a waiver of the privilege against self-incrimination and of the right of confrontation. What divides us, therefore, is solely the question of whether the record affirmatively discloses that the defendant waived his right to a trial by jury. In my view, there is no such showing, and the defendant's plea of nolo contendere accordingly should be set aside.

There is no dispute about what the record reveals with respect to this question. On the day of the canvass concerning the defendant's conditional plea of nolo contendere, the trial court asked the defendant, "You are not admitting any participation in the crime?" to which the defendant replied, "No, sir." Thereafter the court asked, "However you do realize that at this time you are giving up your right to a trial at this present time?" The defendant answered, "Yes, sir." The court then inquired into the defendant's waiver of his other constitutional rights and assured itself that the defendant's plea was not the result of threats or promises. This inquiry was followed by a recitation of the facts of the offense and by advice to the defendant of the maximum penalty that he might receive. There was no further effort to explore the constitutional validity of the defendant's plea except that the court, at the end

of the canvass, asked both counsel to indicate whether they knew of any reason why the plea should not be accepted, and they responded in the negative. This record concededly contains not one word referring to the waiver of a *jury* trial, nor is there any statement, on the record, that the defendant had consulted with his counsel about the constitutional implications of a plea of nolo contendere.

The record as a whole contains the following additional information. The defendant, at the time of his initial plea of not guilty, had elected a jury trial. No jury was, however, empaneled to hear his case because the defendant entered his conditional plea of nolo contendere on a substitute information immediately upon the conclusion of a pretrial evidentiary hearing on his unsuccessful motion to suppress evidence found in his car.

Contrary to the view of the majority, I do not believe that this record demonstrates a knowing waiver of the defendant's constitutional right to a trial by jury. We do not know what the defendant was advised, and by whom, at the time of his original arraignment. More important, whatever he was then advised would not suffice to meet the constitutional requirement that the record must demonstrate a knowing waiver of constitutional rights *at the time* of a plea of guilty or nolo contendere.

There can be no question that *Boykin* v. *Alabama*, supra, and our case law require an affirmative showing that a plea of guilty or of nolo contendere represents an intelligent and voluntary waiver of a defendant's constitutional rights. Because such a plea is the functional equivalent of a conviction, because what is at stake for a defendant is often a long term of imprisonment, our courts have been enjoined to act with the utmost solicitude for the rights of the defendant in

conducting a canvass to assure the defendant's full understanding of what his plea connotes and of its consequences. *Boykin* v. *Alabama,* supra, 243–44; *State* v. *Childree,* supra, 120. In imposing the obligation to undertake such a canvass in open court, and to make an affirmative record, this case law indisputably demands a waiver of constitutional rights that is contemporaneous with the court's acceptance of a plea. The waiver must occur in the plea proceeding itself. I do not understand the majority opinion to be in disagreement with this principle.

In its application of *Boykin* principles to this case, the majority opinion concludes that informing a defendant of a *right to a trial* is the constitutional equivalent of advice concerning his *right to a jury trial.* In order to reach this conclusion, the opinion relies on two factors: (1) the defendant's recollection that, ten months earlier, a different judge had advised him of his right to a jury trial on different charges and that he had then exercised that right; and (2) defense counsel's withdrawal of the defendant's earlier election of a jury trial upon the defendant's agreement to plead nolo contendere to the lesser charges of which he now stands convicted. Neither singly nor jointly do these factors serve to demonstrate the defendant's knowing and intelligent waiver of his right to a jury trial.

I know of no Connecticut case, and the majority cites none, in which pre-plea proceedings have been relied upon to supply an affirmative record of constitutional waiver at the time of a plea canvass for a plea of guilty or of nolo contendere. Those of us who are attorneys may reasonably be held to understand and to recall earlier pleadings and their subsequent consequences. We should not, however, engage in speculation about what a lay defendant may or may not presume about his constitutional rights. For all we know, this defendant may well have been in doubt about the availability

of a jury trial for lesser charges, if indeed he remembered his earlier election at all. It is precisely to avoid such speculation about a defendant's knowing and intelligent decision to forego his constitutional rights that we require waiver to be affirmatively manifested on the record.

The action of defense counsel in withdrawing the claim for a jury trial is similarly insufficient to establish the defendant's own understanding of his constitutional rights at the time of his plea. It is quite possible that the withdrawal only confirmed the defendant's misimpression that a jury trial was no longer warranted for the substituted charges to which he was now pleading. In the absence of any showing on the record that defense counsel explained the constitutional significance of this withdrawal to the defendant, counsel's conduct does not demonstrate waiver by the defendant.

The process of plea bargaining has often been criticized as undermining essential attributes of the criminal justice system. In rejecting an attack on plea bargaining as an allegedly improper infringement of a defendant's constitutional rights, we have concluded that a plea bargain that results from an intelligent and voluntary plea of guilty is "both desirable and constitutional." *State* v. *Lopez,* supra, 350. See also *Corbitt* v. *New Jersey,* 439 U.S. 212, 219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 361–62, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Santobello* v. *New York,* 404 U.S. 257, 260–61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *Staton* v. *Warden,* 175 Conn. 328, 331–33, 398 A.2d 1176 (1978); Wright, "Plea Bargaining—A Necessary Tool," 16 Conn. L. Rev. 1015 (1984). In *State* v. *Lopez,* supra, 350–51, we expressly held that plea bargaining is constitutional, despite the constitutional guarantee of the right to demand a trial by jury. We premised our decision, however, on a record which affirmatively demonstrated a

knowing and voluntary waiver of the right to a jury trial at the time of the plea canvass. We determined that "[p]rior to accepting the defendant's plea, the court specifically informed him that in pleading guilty he was waiving his right to a jury trial . . . . The defendant indicated that he realized he was waiving his right to be tried by offering to plead guilty, and nevertheless proceeded to enter a guilty plea." Id., 351. The record in this case is a far cry from that which we found essential in *Lopez*.

We should not provide further ammunition to the critics of plea bargaining by countenancing a plea canvass that relies on speculation and supposition to establish the needed record of punctilious compliance with constitutional requirements. "[T]he constitutional rights of a criminal defendant in taking either a guilty or a nolo plea must be scrupulously protected." *State* v. *Godek*, supra, 360. In *Godek*, we adopted a standard of substantial compliance for the adjudication of alleged deviations from statutory or Practice Book rules for the taking of a plea, but in announcing that standard we expressly excluded from its ambit possible infringements of a defendant's constitutionally protected rights. Id. With respect to constitutional rights, we have always, until today, followed the rule that a trial judge should not accept a plea of guilty or of nolo contendere unless the defendant is specifically informed of each and every element of his *Boykin* v. *Alabama* rights. *State* v. *Lopez*, supra, 342; *State* v. *James*, 197 Conn. 358, 362, 497 A.2d 402 (1985); *State* v. *Bugbee*, 161 Conn. 531, 536, 290 A.2d 332 (1971). See also *United States* v. *Journet*, 544 F.2d 633, 636 (2d Cir. 1976); *In re Tahl*, 1 Cal.3d 122, 132, 81 Cal. Rptr. 577, 460 P.2d 449 (1969), cert. denied, 398 U.S. 911, 90 S. Ct. 1708, 26 L. Ed. 2d 72 (1970); *Purvis* v. *Connell*, 227 Ga. 764, 766-68, 182 S.E.2d 892 (1971); *State* v. *Abodeely*, 179 N.W.2d 347, 352 (Iowa 1970), cert.

denied and appeal dismissed, 402 U.S. 936, 91 S. Ct. 1617, 29 L. Ed. 2d 104 (1971); *People* v. *Jaworski,* 387 Mich. 21, 30, 194 N.W.2d 868 (1972); *Commonwealth ex rel. West* v. *Rundle,* 428 Pa. 102, 105–106, 237 A.2d 196 (1968); *State* v. *Mackey,* 553 S.W.2d 337, 340–42 (Tenn. 1977); III American Bar Association, Standards for Criminal Justice (1980), Standard 14-1.4; Spinella, Connecticut Criminal Procedure (1985) pp.459–66, esp. 462–63. I cannot agree with the majority opinion's decision to depart from this salutary rule.

Accordingly, I dissent.

ORIGINAL

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner

v.

EARL BADGETT,
Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Earl Badgett, asks leave to proceed in forma pauperis pursuant to Rule 46. Respondent's Affidavit in support of this Moton is attached hereto. Respondent was permitted to proceed in forma pauperis in the Superior Court of Connecticut dated April 18, 1983.

RESPONDENT
EARL BADGETT

BY: G. Douglas Nash

G. DOUGLAS NASH
ASSISTANT PUBLIC DEFENDER
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
(203) 789-7477
Counsel for Respondent

NO. 86-376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

I Earl Badgett, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my Motion for Leave To Proceed In Forma Pauperis, I state that I am confined in the Connecticut Correctional Institution, Enfield and that because of my poverty I am unable to pay the costs of proceedings in this Court or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceedings in this Court are true.

1. Are you presently employed? Yes, I work in the kitchen at Enfield Correctional Center where I am presently incarcerated.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? Income $37 per month for work at Enfield Correctional Center.

3. Do you own any cash or checking or savings account? Yes, I have a prison account of approximately $125.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
None at present.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Earl Badgett
EARL BADGETT

STATE OF CONNECTICUT)
) ss ENFIELD
COUNTY OF TOLLAND)

Personally appeared before me Earl Badgett, signer of the foregoing Affidavit, who, being first duly sworn declared the same to be his free act and deed this 3rd day of September, 1986.

Martin Zeldis
MARTIN ZELDIS
COMMISSIONER OF THE SUPERIOR COURT

NO. 86-376

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,
Petitioner

v.

EARL BADGETT,
Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

G. Douglas Nash
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
(203) 789-7477
Counsel for Respondent

On The Brief:
Martin Zeldis
Assistant Public Defender

October 6, 1986

QUESTIONS PRESENTED FOR REVIEW

1. Whether this case is ripe for Review by this Court where there is no formal judgment from the Connecticut Supreme Court because this matter was remanded by that court to the Connecticut trial court to conduct further proceedings regarding the validity of the instant vehicle search.

2. Whether this on-site search of respondent's automobile made after respondent's arrest was reasonable under the inventory exception to the Exclusionary Rule when such search was not undertaken pursuant to an on site inventory policy and was not undertaken by officers intending to implement such policy, and when this claim is now raised for the first time in the petition for certiorari to this Court.

3. Whether the search of an automobile incident to the arrest of its driver is rendered unreasonable under the Fourth Amendment when the driver had been removed from it at the time the evidence sought to be admitted was discovered.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Counter Statement	2
Reasons For Denying The Writ	3
Conclusion	19
Appendix	1a

TABLE OF AUTHORITIES

CASE AUTHORITIES	PAGE
Bell v. Wolfish, 441 U.S. 520 (1979).....	13
Chimel v. California, 395 U.S. 752 (1969).....	9, 16, 17, 18
Coolidge v. New Hampshire, 403 U.S. 443 (1971).....	9
Cooper v. California, 386 U.S. 58 (1967).....	11
Cox Broadcasting v. Cohn, 420 U.S. 469 (1974).....	4, 5, 6, 7
Ellis v. Dixon, 349 U.S. 458 (1955).....	15
Flynt v. Ohio, 451 U.S. 619 (1981).....	4, 7
Heath v. Alabama, ___ U.S. ___ 106 S.Ct. 433 (1985)....	15
Illinois v. Lafayette, 462 U.S. 640 (1983).....	12, 13
Katz v. United States, 389 U.S. 347 (1967).....	9
Mayhood v. State, 669 S.W.2d 873 (Tex. App. 13 Dist. 1984 Pet ref'd).....	13
Michigan v. Tyler, 436 U.S. 499 (1977).....	13
New York v. Belton, 453 U.S. 454 (1981).....	16, 17, 18
Nix v. Williams, 467 U.S. 431 (1984).....	3, 6
North Dakota Board of Pharmacists v. Snyders Drug-stores Inc., 414 U.S. 156 (1973).....	4
Radio Station WOW v. Johnson, 326 U.S. 120 (1945).....	4
San Diego Gas and Electric Co. v. San Diego, 450 U.S. 621 (1981).....	4, 7, 8
Scott v. United States, 436 U.S. 128 (1978).....	12
South Dakota v. Opperman, 428 U.S. 364 (1976).....	9,10,11,13,15
State v. Badgett, 200 Conn. 412 ___ A.2d ___ (1986)....	1,3,7,10,16, 17,18
State v. Gasparro, 194 Conn. 86,480 A.2d 509 (1984)....	11
State v. Hernandez, 410 So.2d 1381 (1982).....	18
State v. Hudson, 390 A.2d 509 (Me. 1979).....	13
State v. Johnson, 183 Conn. 148,438 A.2d 851 (1981)....	11
State v. Miskolczi, 123 N.H. 626,465 A.2d 919 (1983)...	18
State v. Murphy, 6 Conn. App. 394,505 A.2d 1251 (1986).	11

CASE AUTHORITIES-CONTINUED PAGE

State v. Walker, 579 P.2d 1091 (Ariz. 1978)..... 13

Traylor v. State, 458 A.2d 1170 (Del. 1983)..... 18

United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985)..... 18

United States v. Hall, 565 F.2d 917 (5th Cir. 1978).... 13, 15

United States v. Hellman, 566 F.2d 442 (9th Cir. 1977). 13

United States v. Prescott, 599 F.2d 103 (5th Cir. 1979)..... 13, 14, 15

STATUTORY AND CONSTITUTIONAL AUTHORITIES

Fourth Amendment U.S. Constitution.....i, 2, 9

28 U.S.C. §1257(3)..... 2, 4

MISCELLANEOUS AUTHORITIES

A. Amsterdam, Perspectives on The Fourth Amendment, 58 Minnesota Law Review 349 (1974)..... 15

LaFave, Search and Seizure, A Treatise on The Fourth Amendment, (1986 Supp)..... 16

NO. 86-376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner.

v.

EARL BADGETT,
Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 200 Conn. 412, _A.2d_ (1986) and is reprinted in full in the appendix to petitioner's brief.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on July 8, 1986. The petitioner claims jurisdiction under 28 U.S.C. 1257(3). As will be detailed below the respondent opposes this jurisdictional claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. §1257(3) provides as follows:

> **§1257. State courts; appeal; certiorari**
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

COUNTER STATEMENT

For the purpose of this brief the respondent does not oppose the petitioner's statement contained at pages two through five of its petition except as follows:

1. At page four of the petition the factual statement contained therein might be interpreted to mean that the search of the black bag was made prior to the respondent being taken from the scene. The conclusion of the Connecticut Supreme Court which is supported by the evidence is that the search of the black bag found in the respondent's automobile was not

made until after the respondent had been removed from the scene. State v. Badgett, 200 Conn. 412, 423, 427-428, Tr. at 30, 79.[1]

2. At page five of its brief the petitioner represents that the State Supreme Court concluded that "because the officers did not search the vehicle pursuant to a formal on-site inventory policy the inventory exception to the warrant requirement was not applicable." The court's opinion adds to the above reason the following as another justification for its holding. "Further, it is clear that the officers' purpose in searching the vehicle at the scene was to investigate and not to inventory the contents." State v. Badgett, supra at 431.

REASONS FOR DENYING THE WRIT

1. **The Instant Connecticut Supreme Court Decision Is Not A Final Judgment.**

The respondent contends that the Connecticut Supreme Court's opinion in State v. Badgett, supra, is not a final judgment. Although the state court's opinion does decide the three presented exceptions to the warrant requirement in the respondent's favor (search incident to an arrest, probable cause and inventory search) the court's decision to remand this case hinges on its discussion of "inevitable discovery" as a possible exception to the exclusionary rule as adopted by this court in Nix v. Williams, 467 U.S. 431 (1984). Interestingly, the court's opinion does not find error or no error; does not reverse or affirm. The court simply remands the case for further proceedings in accordance with the opinion. State v. Badgett, supra at 434. Thus, not only is there not a final judgment here, there is no judgment at all: The Connecticut Supreme Court has simply remanded the matter for futher proceedings without ultimately deciding the case one way or the other.

1. "Tr. at _" refers to the transcript of that portion of the suppression hearing held on February 15, 1983.

The United States Code at 28 U.S.C. §1257 attempts to limit Supreme Court review to final judgments of the highest state court which could review the decision. The purposes of this limited review of state court judgments are threefold: "(1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Article III; (3) it limits review of state court determination of federal constitutional issues to leave at a minimum federal intervention in state affairs." North Dakota Board of Pharmacists v. Snyders Drug Stores Inc., 414 U.S. 156, 159 (1973).

The requirement that review by this court must be predicated upon a final state court judgment has existed since 1887, and although some exceptions have been made to the finality requirement, they are permitted "[o]nly in a very few situations where intermediate rulings may carry serious public consequences..." Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945). This court still consistently holds that the finality "requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." Id. at 124. See also Flynt v. Ohio, 451 U.S. 619 (1981); San Diego Gas and Electric Co. v. San Diego, 450 U.S. 621 (1981).

The definative case on the exceptions to the finality rule is Cox Broadcasting v. Cohn, 420 U.S. 469 (1974). While acknowledging the importance of the final judgment rule, the court in Cox set forth four exceptions to the rule as follows:

1. Those cases where there are further proceedings yet to occur but the federal issue is conclusive, or the outcome of further proceedings is preordained. Id. at 479.

2. Those cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings. Id at 480.

3. Those cases where the federal claim has been finally decided, with further proceedings on the merits still to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case. Id. at 481.

4. Those cases where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by the Supreme Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceeding still to come. Id. at 482-483.

This Court in Cox further noted that "[i]n most, if not all, of the cases in these categories [the exceptions to the finality rule] these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date...." Id. at 477.

It appears clear that the first three exceptions to the finality requirement of §1287 do not apply here. The federal issue is not conclusive and the outcome of future proceedings is not preordained. The federal issue will not necessarily survive and require decision no matter what the outcome of future proceedings. The federal issue has not been finally decided and even if it had been it cannot be said that review by this court cannot be had no matter what the outcome of the further proceedings.

The petitioner suggests in its petition at footnote 5 that review can be made here pursuant to the fourth exception stated in Cox. In so suggesting the petitioner seriously misstates the standards set by the fourth exception of Cox.

First, even if the federal issues raised by the state have been decided, which is not conceded by the respondent, the standard set by the fourth exception in Cox relates to the federal issue(s) decided by the highest state court, not selective federal issue(s) raised by the petitioner in its petition. Here the federal issue relates to the constitutionality, under the fourth amendment, of the search of respondent's automobile. Since the Connecticut Supreme Court remanded this case for further proceedings related to the constitutionality under the fourth amendment of the instant search, it cannot be said that the Federal issue involved here has been finally resolved.

Second, the fourth exception stated in Cox requires that the futher proceedings ordered by the state court might result in the petitioner prevailing on nonfederal grounds. Since, the further proceedings ordered by the Connecticut Supreme Court relate to another exception of the exclusionary rule as decided by this court in Nix v. Williams, supra, there is no possibility that the petitioner would prevail in the further proceedings on nonfederal grounds. The hearing ordered by the Connecticut Supreme Court was for the consideration of a federal issue.

For these reasons the respondent contends that the petitioner does not meet the requirements of the fourth exception to the finality rule as stated in Cox.

In Flynt v. Ohio, 451 U.S. 619 (1981), the court specifically discussed the applicability of the fourth exception in Cox saying that the requirements of the exception were not met. "The cases which the Cox opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts. (citations omitted). Here there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward." Id. at 622. Likewise here no federal policy will suffer in any way if the proceeding ordered by the Connecticut court goes forward.

This court in Flynt also declined to treat the matter as falling within the final judgment exceptions specified in Cox because there were additional unresolved federal issues which were likely to come up in the further proceedings to be held in the state court. Flynt v. Ohio, supra at 621. Here as discussed above the further proceeding ordered by the Connecticut Supreme Court will necessarily address federal issues of the same type and deal with the same search and the same constitutional principles as those addressed by the Connecticut Supreme Court in its opinion in State v. Badgett, supra. See also San Diego Gas and Electric v. San Diego, 450 U.S. 621 (1981), where the highest California court held that there was no entitlement to a monetary award for an alleged property condemnation but ordered further proceedings to determine if there was any other appropriate remedy. As argued herein by the instant respondent this court held in San Diego that the Cox exceptions did not apply because "further proceedings are necessary to resolve

the federal question whether there has been a taking at all. The court's decision therefore is not final and we are without jurisdiction to review it." San Diego Gas and Electric v. San Diego, supra at 633.

For these reasons the respondent maintains that the court should deny the state's petition for a writ of certiorari. Without a final judgment from the Connecticut Supreme Court, this Court does not have jurisdiction pursuant to 28 U.S.C. §1257 to accept this matter.

In dealing with the two substantive issues raised by the petitioner it should be pointed out that the Fourth Amendment and the relevant cases provide that the normal rule is that a search must be performed pursuant to a warrant. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357; (1967) Chimel v. California, 395 U.S. 752, 760-762 (1969). While the state in its petition points to recognized exceptions to the warrant requirement, it must be remembered that we are addressing exceptions to the rule rather than the rule itself, and whether the search activities performed here qualify under the warrant requirement exceptions raised by the petitioner. The Connecticut Supreme Court held that they did not.

2. When A Search Is Performed Without An Inventory Purpose And Is Not Based Upon Rules Regarding Inventory Searches It Does Not Qualify For The Inventory Search Exception To The Warrant Requirement.

The respondent concedes that inventory searches are a recognized exception to the warrant requiremnt. South Dakota v. Opperman, 428 U.S. 364 (1976). The respondent argues though that the petitioner's attempted extension of this acknowledged exception to the warrant requirement, in order to validate a search when there is no inventory motive and no inventory rules or guidelines to follow, is simply preposterous. As will be shown, this extreme position, advocated now for the first time by the state, is unsupported by any law in any jurisdiction. In addition the petitioner wants this Court to go one step further. It wants this court to hold that even though the Connecticut Supreme Court has followed the clear thrust of Opperman and other precedents in deciding the instant inventory issue, nonetheless the court acted unreasonably in deciding

that an inventory search must have an inventory motive and must be performed pursuant to inventory rules and guidelines.

Despite the state's claim in its petition at page six that certiorari should be granted here because there is conflict in state and federal jurisdictions and resulting confusion relative to the handling of "inventory searches," the respondent maintains that there is no conflict of authority when applying the law to the facts present here; that Connecticut has developed its inventory search law based upon Opperman and has exhibited no confusion whatsoever; and that whatever conflict of authority might exist regarding inventory searches, this case is not an appropriate vehicle for this court to attempt to resolve such alleged conflict. The obvious and natural conclusion of this petitioner's claim goes far beyond inventory searches, because if its position were adopted it would permit any search of anybody and his possessions who is taken into custody no matter what the basis; no matter what the motive.

In contrast to its detailed treatment of the search incident to an arrest and probable cause aspects of the search of respondent's vehicle, the Connecticut Supreme Court was able to succinctly decide the inventory search aspect.

> The state also contends that the warrantless search and seizure of the contents of the black bag were constitutionally permissible in order to inventory the contents of the vehicle. We summarily reject this contention ...
> Although we have recognized the validity of department authorized inventory searches; (citation omitted); the state, as is its burden, did not offer evidence of any police department practice for inventory searches to be conducted on the highway by field officers. Further, it is clear that the officers' purpose in searching the vehicle at the scene was to investigate and not to inventory the contents. The fact that no lists of property were made and that the officers discontinued their search immediately after discovering the contraband indictes that the search was not undertaken to inventory the contents of the vehicle. State v. Badgett, supra at 431.

In South Dakota v. Opperman, supra, this court approved of police inventory searches as an exception to the warrant requirement. See also Cooper v. California, 386 U.S. 58 (1967). In allowing this exception to the warrant requirement this court applied a reasonableness standard to "inventory searches" and set forth guidelines on determining the legitimacy of such searches.

> "The decisions of this court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable.' South Dakota v. Opperman, supra at 372.
>
> "In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents.
> Id. at 373.

The standards announced in Opperman by this court merely state the obvious; that for an "inventory" search to be valid it must be performed for inventory purposes pursuant to standard police procedures. The petitioner concedes, as the Connecticut Supreme Court decided, that such was not done here. Connecticut and other jurisdictions in the ten years since Opperman have relied upon and applied the standards set forth there in determining the reasonableness of inventory searches. For Connecticut see State v. Gasparro, 194 Conn. 86, 108, 480 A.2d 509 (1984); State v. Johnson, 183 Conn. 148, 438 A.2d 851 (1981); State v. Murphy, 6 Conn. App. 394, 401 n.8, 505 A.2d 1251 (1986).

The petitioner points to a number of cases from various jurisdictions which it claims support the contention that neither an inventory purpose nor inventory procedures are necessary for a search to qualify for the inventory exception to the warrant requirement. Upon closer scrutiny it is clear that none of the cited cases stand for this proposition.

Scott v. United States, 436 U.S. 128 (1978), relied on heavily by the petitioner for the claim that an inventory purpose is not necessary, was not an inventory search case; it was a wiretap case. The question decided there was whether a minimization limitation on nonrelated interceptions was complied with. In deciding that the lower court had not improperly decided that the minimization order had not been violated, the court applied a reasonableness standard and looked, as they could in the wiretap situation, to the actions of the police officers in intercepting calls rather than trying to determine the state of mind of the officers when the interceptions were made.

Illinois v. Lafayette, 462 U.S. 640 (1983) was an inventory search of a handbag performed for inventory purposes pursuant to a standardized inventory procedure. All that Lafayette says is that inventory searches are valid to protect the police against certain risks such as false claims by detainees of property loss and department theft or carelessness in handling the property of detainees, and just because the officer making the search does not specifically consider such possibility "the need to protect against such risks arises independently of a particular officer's subjective concerns." Id. at 647.

Although cited by the petitioner in support of its position, Illinois v. Lafayette, holds very much for the respondent's position relative to the need for inventory searches to be performed pursuant to standardized inventory procedures.

> "A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits thefts or careless handling of articles taken from the arrested person. ... Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure."

Id. at 646.

Lafayette is much more on point regarding whether an inventory

search needs to be performed pursuant to standardized procedures than are Bell v. Wolfish, 441 U.S. 520 (1979) and Michigan v. Tyler, 436 U.S. 499 (1977) cited by the petitioner in support of its contention that standardized procedures are not necessary. Neither Bell v. Wolfish nor Michigan v. Tyler are inventory searches. Wolfish involves a body cavity search. Tyler involves a fire marshall's investigatory search. Both cases deal with the reasonableness of the search. Neither case turns on the lack of procedural standards. In any event, since Lafayette and Opperman deal directly with inventory searches and since both appear to require that such searches be performed pursuant to standardized inventory procedures, the respondent maintains that those rulings are controlling.

Even the lower court cases cited by the petitioner do not support its position. While, when claiming a conflict of authority the petitioner concedes that cases such as United States v. Hellman, 556 F.2d 442, 443-4 (9th Cir. 1977) and State v. Hudson, 390 A.2d 509, 511 (Me. 1979) are supportive of the respondent's position, it points to United States v. Hall, 565 F.2d 917, 922 (5th Cir. 1978); State v. Walker, 579 P.2d 1091, 1098 (Ariz. 1978); Mayhood v. State, 669 S.W.2d 873, 874 (Tex. App., 13 Dist. 1984 pet. ref'd); and United States v. Prescott, 599 F.2d 105-106 (5th Cir. 1979) as supportive of its position. The respondent submits that petitioner's reliance on these cases for the proposition that an inventory search to be valid need not have either an inventory purpose or be performed pursuant to standardized policies is misplaced.

In United States v. Hall, supra at 919, 921-22, Mayhood v. State, supra at 874, and State v. Walker, supra at 1098, the searches all had inventory purposes, inventory forms were completed in at least two of the searches and all the searches were performed pursuant to standard department policy. All three cases hold that if the officer performing the inventory search hopes or

intends to discover evidence during the inventory search, a valid inventory search is not thereby rendered invalid. The respondent here concedes this point, but notes that it has no relevance to the instant situation because there was no valid inventory search performed here.

Even the most extreme case cited by the petitioner United States v. Prescott, supra requires that to be valid an inventory search must have an inventory purpose. "Inventory searches must be limited to effectuation of the recognized purposes for which they are conducted and they may not be used as a pretext for intrusive investigatory searches that would be otherwise impermissible." Id. at 105.

From the foregoing it appears that there is no caselaw which supports the extreme position maintained by the petitioner. Therefore, the claim that this court should grant certiorari in order to reconcile the conflicting authorities is in this instance wholly without merit.

Turning briefly to one final consideration, the respondent is constrained to note that the petitioner raises the inventory argument in this form for the first time in its petition to this court. In fact, at the state level the petitioner elected not to address the inventory exception to the warrant requirement, explaining in its brief that this was "because the record demonstrates that the trial court correctly upheld the search on grounds that it was incident to the defendant's arrest and was based upon probable cause to search for weapons. Therefore, this court can sustain the trial court's ruling on those grounds and need not reach the question of inventory search." Res. App. at 1a.

Although it appears from petitioner's brief that it was abandoning the inventory aspect of the instant search, the respondent concedes that the petitioner never formally did so. But at no time did the state formally address the inventory issue and

it certainly was not ever addressed in the form that is now presented to this court.

This court has consistently held that it will not consider on a petition for certiorari an issue that was not raised below. Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1985); Ellis v. Dixon, 349 U.S. 458, 460 (1955). Therefore, for this additional reason the respondent maintains that this court should decline to grant certiorari to the petitioner as to the "inventory search" issue.

There is no conflict of authority of the sort claimed by the petitioner. Thus, this is not an appropriate case for this court to review because it can not possibly be shown that the Connecticut Supreme Court decided unreasonably when its holding that there was no inventory search here was based upon the clear guidelines set forth by this court in South Dakota v. Opperman, supra.

The petitioner contends that the fruits of a warrantless search should be admitted simply because there exists an inventory exception to the warrant requirement. The state is not troubled by the lack of inventory purpose and is oblivious to the need for standardized inventory rules. Yet rulemaking has a valid purpose in that it "supplies a needed check against arbitrariness in the conduct of various searches and seizures." A. Amsterdam, Perspectives on the Fourth Amendment, 58 Minnesota Law Review 349, 418 (1974). This contention flies in the face of all authorities and would open our highways, our homes and our persons to uncontrolled pretextual searches. The petitioner maintains that the pretextual searches which would result from ruleless and motiveless "inventory searches" should be of no concern to this court because all police powers are subject to abuse through pretextual use. But even the authorities cited by the petitioner express disapproval of the possible pretextual use of inventory searches. See United States v. Hall, supra at 922; United States v. Prescott,

supra at 105. For all these reasons this court should refuse the state's petition for certiorari as to the "inventory" search claim.

3. It Was Reasonable To Conclude That The Search Of Respondent's Automobile Did Not Qualify Under The "Search Incident To An Arrest" Exception To The Warrant Requirement.

The Connecticut Supreme Court decided, based on the evidence that at the time the black bag in respondent's automobile was opened by Officer Kiernan and the white powdery substance discovered within, the respondent had been removed from the scene. State v. Badgett, supra at 423, 427, 428. The court ultimately held "that the right of a police officer to search the vehicle ceases the instant the arrestee departs the scene because the arrestee's removal forecloses any possibility that he could reach for an article within the vehicle." Id. at 428.

The reason for allowing an exception to the warrant requirement for searches made incident to an arrest is to protect police officers from a weapon that the arrestee may grab and use against the police officer and to protect evidence which the arrestee may attempt to reach and destroy. Chimel v. California, 395 U.S. 752, 768 (1969).

In New York v. Belton, 453 U.S. 454 (1981) this court held that "when a policeman has made a lawful custodial arrest of the occupant of the automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460. Although Belton was an attempt to establish an understandable, standardized rule which could be easily followed by the police, it was noted by Justice Brennan's dissent in Belton and by subsequent commentators that the Belton rule does not provide the definitive answer for all warrantless vehicle searches made incident to an arrest. Id. at 470; W. LeFave, Search and Seizure, 1986 Supp. §7.1 at 218.

One of the factors left unspecified by Belton is the defini-

tion of "contemporaneous". All that Belton requires is that the search take place as a contemporaneous incident of the arrest. The court therein appropriately left the concept open for the individual courts to determine whether in fact a particular search was indeed "contemporaneous", as such a term can only be evaluated on an ad hoc basis. In the instant case, the definition of the term contemporaneous becomes crucial to the validity of the search of respondent's vehicle. The Connecticut Supreme Court held "that the right of a police officer to search the vehicle ceases the instant the arrestee departs the scene because the arrestee's removal forecloses any possibility that he could reach for an article within the vehicle." State v. Badgett, supra at 428. Thus the Connecticut Supreme Court has defined "contemporaneous" in Belton type searches incident to an arrest to mean the time during which the arrestee is at the scene of the stop. The fruits of any search activities which occur after the arrestee has left the scene will not be admissilbe under the search incident to an arrest exception to the warrant requirement.

The state maintains that this Court should grant its petition and then define "contemporaneous" as including all searches which are commenced while the arrestee is on the scene no matter when they terminate. In answer to this contention the respondent maintains that the definition of "contemporaneous" made by the Connecticut Supreme Court is more appropriate than the definition advocated by the petitioner. Since the rationale for the search incident to an arrest exception as decided by Chimel is to protect the officer and to protect the evidence, and since Belton is an attempt to apply Chimel to the highway arrest, the need for the search ceases the instant that the risk ceases. The risk ceases the instant the arrestee is removed from the scene. The risk to the officer and the evidence may end long before the search of the

stopped vehicle is concluded. Support for this contention is found in several cases cited by the Connecticut Supreme Court where the search was found to be proper when the arrestee was handcuffed and/or out of the vehicle being searched, but was still at the scene. State v. Badgett, supra, at 427. Therefore the deciding factor for the Connecticut Supreme Court was that this respondent had been removed from the scene, thereby foreclosing any risk to the officers or evidence at the hands of the respondent.

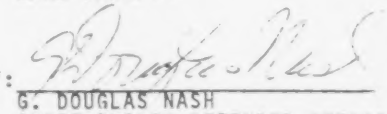
The respondent also argues that because this court did not define "contemporaneous" in Belton, the Connecticut court was bound only to a reasonable standard in defining and applying that term. Since the Connecticut Supreme Court followed the directives and heeded the concerns identified by both Chimel and Belton relative to the need to protect evidence and arresting officers, and not to allow unnecessary and unreasonable searches, it can not be said that the holding of the Connecticut Supreme Court was unreasonable.

The cases decided since Belton appear to be consistent with both the holding of the Connecticut Supreme Court as well as the principles of Chimel and Belton thus putting into question petitioner's contention that there is significant confusion and a need for guidance as to how to apply the "contemporaneous" requirement of Belton. On the one hand there are the cases where the arrestee is still on the scene where the courts have consistently held that the search incident to the arrest was proper. United States v. Cotton,751 F.2d 1146 (10th Cir. 1985); Traylor v. State, 458 A.2d 1170 (del 1983); State v. Miskolczi, 123 N.H. 626, 465 A.2d 919 (1983). On the other hand where the arrestee was removed from the scene, having been taken to the police station, the search of the vehicle he had earlier occupied was not permissible as incident to his arrest. State v. Hernandez, 410 So.2d 1381 (La. 1982)

CONCLUSION

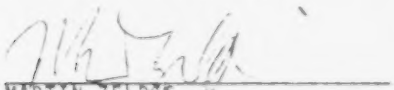
For the reasons specified herein the respondent contends that there is no final jedgment from which the petitioner seeks certiorari; the search performed here was not an inventory search; the search performed here was incident to the respondent's arrest. The petition for certiorari should be denied.

RESPONDENT
EARL BADGETT

BY: 

G. DOUGLAS NASH
CHIEF PUBLIC DEFENDER OFFICE
121 ELM STREET
NEW HAVEN, CONNECTICUT 06510
(203) 789-7477
COUNSEL FOR THE RESPONDENT

WITH WHOM ON THE BRIEF IS:



MARTIN ZELDIS
ASSISTANT PUBLIC DEFENDER

October 6,1986

No. 86-376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT

Petitioner,

v.

EARL BADGETT,

Respondent,

APPENDIX

OF THE

RESPONDENT

FOOTNOTE IN PETITIONER'S
BRIEF IN THE CONNECTICUT SUPREME
COURT REGARDING INVENTORY
SEARCH

At Page 36

7. The defendant also contests the third ground of the trial court's denial of his motion to suppress, i.e. that the search was a valid inventory search. Defendant's Brief at 12-14. The state does not address this issue in its brief, because the record demonstrates that the trial court correctly upheld the search on grounds that it was incident to the defendant's arrest and was based on probable cause to search for weapons. Therefore this Court can sustain the trial court's ruling on those grounds and need not reach the question of inventory search. Cf. State v. Geyer, 194 Conn. 1, 17, 480 A.2d 489 (1984) (Shea, J. Concurring).

Supreme Court, U.S.
FILED
OCT 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner,

V.

EARL BADGETT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

---

BRIEF OF AMICI CURIAE, ARKANSAS, HAWAII, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, VERMONT, THE VIRGIN ISLANDS, VIRGINIA, AND WISCONSIN*

DAVID CRUMP
Counsel of Record
South Texas College of Law
c/o The Legal Foundation of America
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040

**Each sponsored according to Rule 36.4 by its attorney general pursuant to list of counsel continued inside front cover*

List of Counsel continued:

John Steven Clark, Attorney General, State of Arkansas
Corinne K. A. Watanabe, Attorney General, State of Hawaii
James T. Jones, Attorney General, State of Idaho
Linley E. Pearson, Attorney General, State of Indiana
David L. Armstrong, Attorney General, Commonwealth of Kentucky
William J. Guste, Jr., Attorney General, State of Louisiana
Frank J. Kelley, Attorney General, State of Michigan
Hubert H. Humphrey, III, Attorney General, State of Minnesota
Lacy H. Thornburg, Attorney General, State of North Carolina
Nicholas J. Spaeth, Attorney General, State of North Dakota
Michael C. Turpen, Attorney General, State of Oklahoma
T. Travis Medlock, Attorney General, State of South Carolina
Jeffrey L. Amestoy, Attorney General, State of Vermont
Leroy Mercer, Attorney General, Territory of the Virgin Islands
Mary Sue Terry, Attorney General, Commonwealth of Virginia
Bronson C. LaFollette, Attorney General, State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISION OF A COURT OF APPEALS ON ISSUES OF FEDERAL LAW 2

II. THE CASE AT BAR PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 2

A. *The Duty of Arresting Officers to Preserve Arrestees' Property, to Protect Public Safety, and to Prevent False Claims of Loss or Theft, Present Substantial Questions Here* 2

B. *The Requirement of a Formal Inventory Policy, Before an Otherwise Reasonable Automobile Search at the Scene of Arrest Can Be Undertaken, Presents Substantial Questions* 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Cady v. Dombrowski, 413 U.S. 433 (1973)	3
California v. Carney, 105 S. Ct. 2066 (1985)	2
Chambers v. Maroney, 399 U.S. 42 (1970)	5
Cooper v. California, 386 U.S. 58 (1967)	3, 4, 6
Florida v. Meyers, 104 S. Ct. 1852 (1984)	4
Harris v. United States, 390 U.S. 234 (1968)	6
Illinois v. Lafayette, 462 U.S. 604 (1983)	3, 4
Michigan v. Long, 463 U.S. 1034 (1983)	2
Michigan v. Thomas, 458 U.S. 259 (1982)	4, 5
New York v. Belton, 453 U.S. 454 (1981)	2, 4, 5
New York v. Quarles, 104 S. Ct. 2626 (1985)	3, 5, 6
South Dakota v. Opperman, 428 U.S. 364 (1976)	3, 4, 6
United States v. Hellman, 556 F.2d 442 (9th Cir. 1977)	2
United States v. Prescott, 599 F.2d 103 (5th Cir. 1979)	2
United States v. Rabinowitz, 339 U.S. 56 (1950)	4

SECONDARY AUTHORITIES

LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127 — 5

NO. 86-376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner,

V.

EARL BADGETT,

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states, whose officers in the field must frequently encounter the potentially dangerous situation disclosed in this case. Further, these officers frequently must impound vehicles upon arrest in circumstances similar to those in this case. Securing the vehicle for protection of public safety, preservation of arrestees' property, and prevention of false claims of theft or property loss, is an important and legitimate objective and cannot always be conducted pursuant to detailed, formal, written policies. The situation in this case is a recurrent one, to which there are many analogous holdings of this Court, but none is squarely on point.

Amici further note that, in these situations, arresting officers often turn vehicles over to civilian wrecker drivers. Any reasonable person would recognize in the present case the high probability that the vehicle contained firearms, contraband drugs, or even money, which would be easily stolen while the vehicle is out of police custody. To turn over the vehicle to an individual of unknown qualifications, when it may contain easily accessible items that virtually invite theft, would be irrespon-

sible. Officers should have authority, when to do so is reasonable under all the circumstances, to secure the vehicle at the scene, rather than to delay inventory in reliance on formalized procedures.*

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISION OF A COURT OF APPEALS ON ISSUES OF FEDERAL LAW.

The Petition for Certiorari discloses the conflicts in the decisions below, concerning whether an inventory of the kind at issue can be valid without a standardized inventory policy. *Compare, e.g., United States v. Prescott*, 599 F.2d 103, 105-06 (5th Cir. 1979) (existence of inventory policy and intent to effectuate it not necessary to valid inventory search) *with* the decision below *and, e.g., United States v. Hellman*, 556 F.2d 442, 443-44 (9th Cir. 1977) (search held invalid because of absence of inventory policy and intent to effectuate it).

II. THE CASE AT BAR PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. The Duty of Arresting Officers to Preserve Arrestees' Property, to Protect Public Safety, and to Prevent False Claims of Loss or Theft, Present Substantial Questions Here.

A very high percentage of arrests involves automobiles. *Cf. California v. Carney*, 105 S. Ct. 2066 (1985); *Michigan v. Long*, 463 U.S. 1034 (1983); *New York v. Belton*, 453 U.S. 454 (1981). In a high percentage of these cases, the arresting officers

---

* This brief deals with the first question presented by Petitioner, but amici agree with, and express support for, Petitioner's arguments on the second question also.

have responsibility for ensuring that the vehicle is taken into custody. Both the arresting officers and the police department then have responsibility for its safekeeping and for public safety.

The public safety aspects of this responsibility are significant. Officers usually do not know what may be in a vehicle taken into custody. The presence of weapons or contraband is not unusual. *Cf. South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory of impounded car revealed contraband). In *Cady v. Dombrowski*, 413 U.S. 433 (1973), this Court held that the "impression" that the vehicle driver, who was a police officer, may have had a firearm that could be stolen from the locked trunk of a towed vehicle, was a factor in making the search reasonable. So should the expectation that an impounded vehicle contains unknown controlled substances, which are as much subject to theft and misuse as the pistol in *Cady v. Dombrowski*. A less probable, but occasional event is the impoundment of vehicles that contain dangerous substances such as explosives or poisons. *Cf. Cooper v. California*, 386 U.S. 58 (1967) (search justified for officers' own protection). Although such vehicles are infrequently impounded, they are to be found among the thousands of vehicles that are impounded annually, and they create serious danger on those occasions. As in *Illinois v. Lafayette*, 462 U.S. 604 (1983), in which this Court recognized the need for inventories of the contents of containers held by arrested suspects because the contents sometimes are dangerous, inventory in such a case as this one is warranted by public safety concerns. *See also New York v. Quarles*, 104 S. Ct. 2626 (1985) (statement elicited from arrested suspect, regarding location of weapon, held admissible under public safety exception although otherwise possibly inadmissible).[1]

---

1 In *Quarles*, the arrestee had been arrested and handcuffed; he was surrounded by four officers who had holstered their weapons because the situation was "under control;" and an officer asked him where his weapon was. The Court's holding was as follows: "We hold that on these facts there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and that the availability of the exception does not depend on the motivation of the individual officers involved."

Likewise, the need to preserve property and protect against false claims of theft is a significant concern. *See Opperman, supra; Lafayette, supra; see also Michigan v. Thomas*, 458 U.S. 259 (1982) (recognizing that property in automobile may be "tampered with" after arrest, while out of police custody). In this case, the arresting officers turned the vehicle over to someone else to tow it to police headquarters. Officers who are turning over a vehicle to a civilian wrecker driver should know, first, what is inside readily accessible areas, particularly when (as here) any reasonable person would know of the high likelihood that the automobile contained contraband drugs or weapons that could be stolen and sold (or even might contain money). What was to prevent the theft or misuse of these items by a non-police employee during towing? Before turning the vehicle over, the arresting officers should be able to make at least a brief determination on the scene that the vehicle does or does not contain such items. *Lafayette, supra.*

B. The Requirement of a Formal Inventory Policy, Before an Otherwise Reasonable Automobile Search at the Scene of Arrest Can Be Undertaken, Presents Substantial Questions.

The legality of these kinds of searches should not depend upon the existence of a formal policy minutely prescribing the actions of the officers. *New York v. Belton, supra.* In the first place, the custodial function of a police department should not be reduced to rules and regulations as a matter of fourth amendment law. The issue, after all, "is not whether it was reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. California*, 386 U.S. 58, 62 (1967), citing *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).[2]

---

2 *See also Michigan v. Thomas*, 458 U.S. 259 (1982) ("the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant"); *Florida v. Meyers*, 104 S. Ct. 1852 (1984)

In the second place no such policies can or should attempt to prescribe the steps that officers should follow during a dangerous highway stop of a suspect whom officers have been informed may have a sawed-off shotgun in his possession, as in this case. Such policies are likely to require counterproductive or even dangerous actions by officers, if they are written in detail.[3] Furthermore, it is unlikely that any formal policy could or would prescribe police conduct with the minute detail necessary to cover a situation such as this one—in which officers have carefully sought to effect the safe, uneventful arrest of a potentially dangerous suspect, one officer has found and moved an item but in the press of business has not told the other, and, finally, the other officer inspects an item that is likely to contain valuable or contraband property, in preparation for turning the vehicle over to a non-police-officer wrecker driver. If a formal policy attempted to provide detailed direction for such a case, it could result in requiring counterproductive or even dangerous behavior, and could not anticipate all eventualities.

As this Court said in *Quarles, supra,* in a closely analogous fact situation,

> In a kaleidoscopic situation such as the one confronting these officers where spontaneity

---

(Court held, on authority of *Thomas*, that the lower court had erred in concluding that a warrantless search of a car was improper where the car had been impounded eight hours earlier and was presently stored in a secure area); *cf. Chambers v. Maroney*, 399 U.S. 42 (1970) (search on probable cause may take place after vehicle is immobilized, without warrant).

3 Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable . . . . A highly sophisticated set of rules . . . may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

New York v. Belton, 453 U.S. 454 (1981), *quoting* LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 742.

> rather than adherency to a police manual is the order of the day, the application of the [public safety] exception we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

The situation in *Quarles* was unusual in nature, yet it called for this Court's review by certiorari. The question at issue in this case undoubtedly recurs far more frequently, and should be controlled by the same principles, but has been the subject of confusion and conflict in the decisions.

Although most of the cases decided by this Court that have dealt with inventories have concerned "standard procedures," there have been certain cases in which the existence of such procedures has not been relevant. In *Cooper v. California, supra,* the vehicle was impounded pursuant to a forfeiture statute, which did not authorize search or inventory. The officers inventoried it fully a week later, without a warrant, and with no mention in the opinion of standard procedure. The Court upheld the search. Further, in *Harris v. United States,* 390 U.S. 234 (1968), an officer opened an impounded car while taking steps to safeguard it against the elements after completing an inventory search. He observed a car registration card lying on the metal stripping of the car door. The court, having noted that the legality of the earlier inventory was not presented, went on to hold that the entry into the vehicle was lawful because the action was "taken to protect the car while it was in police custody," irrespective of the lawfulness of the earlier inventory.[4] These

---

4 In *South Dakota v. Opperman, supra,* this Court explained *Harris* thus:

cases involve situations less likely to recur than the vehicle impounded upon arrest, which the officers, as here, wished to secure before turning over to other personnel. Review should be granted to determine whether those holdings should be extended to the more common situation presented here.

Jurisdictions differ nationwide on whether and to what extent they have formal policies governing such events. As the petition for certiorari demonstrates, there have been significant differences among the courts that have considered similar searches on the question whether a formal policy is relevant or required. The question is one as to which courts have divided, is of national importance, and should be decided by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

David Crump
Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae

The Court expressly noted that the legality of the inventory was not presented, since the evidence was discovered at a point when the officer was taking protective measures to secure the automobile from the elements. But the Court clearly held that the officer acted properly in opening the car for protective reasons.

Id. at n.9.

(3)

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-376

In The Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY MEMORANDUM FOR THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

BPP

Printed by
Brescia's Printing Services
66 Connecticut Boulevard
East Hartford, CT 06108
525-6029

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTORY AND PRACTICE BOOK PROVISIONS INVOLVED 1

ARGUMENT

I. THIS CASE FALLS WITHIN THE EXCEPTIONS TO THE FINAL JUDGMENT RULE RECOGNIZED IN *COX BROADCASTING CORP. V. COHN,* 420 U.S. 469 (1975) 2

II. BECAUSE THE CONNECTICUT SUPREME COURT ELECTED TO PASS UPON THE QUESTION WHETHER THE AUTO SEARCH WAS REASONABLE UNDER THE FOURTH AMENDMENT AS AN INVENTORY SEARCH, THIS COURT HAS JURISDICTION OVER THE FIRST QUESTION PRESENTED 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:	Page(s)
Beecher v. Alabama, 389 U.S. 35 (1967)	6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	2, 4
Delevieleuse v. Manson, 184 Conn. 434, 439 A.2d 1055 (1981)	3
Flynt v. Ohio, 451 U.S. 619 (1981)	4
Herb v. Pitcairn, 324 U.S. 117 (1945)	3
Illinois v. Gates, 462 U.S. 213 (1983)	6
Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123 (1914)	6
New York v. Belton, 453 U.S. 545 (1981)	4
Nix v. Williams, 467 U.S. 431 (1984)	2
Orr v. Orr, 440 U.S. 268 (1979)	6
San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981)	5
State v. Wilson, 180 Conn. 481, 429 A.2d 931 (1980)	3
United States v. Feldman, 788 F.2d 544 (9th Cir. 1986)	6
United States v. Prescott, 599 F.2d 103 (5th Cir. 1979)	6

TABLE OF AUTHORITIES (continued)

Federal Statutes: **Page(s)**

28 U.S.C. § 1257 . . . . . 2, 3

State Statute:

Conn. Gen. Stat. § 54-94a 3

State Practice Book Provision:

Conn. Prac. Bk. § 4000 3

No. 86-376

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

EARL BADGETT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY MEMORANDUM FOR THE STATE OF CONNECTICUT

I. THIS CASE FALLS WITHIN THE EXCEPTIONS TO THE FINAL JUDGMENT RULE RECOGNIZED IN *COX BROADCASTING CORP. V. COHN,* 420 U.S. 469 (1975)

As the record makes clear, after finding a Fourth Amendment violation, the Connecticut Supreme Court remanded this case to the trial court for a determination of whether the inculpatory evidence should nevertheless be suppressed at trial by reason of the inevitable discovery rule recognized by this Court in *Nix v. Williams,* 467 U.S. 431 (1984). Pet. App. at 21a–23a. The respondent claims that these further proceedings render the state supreme court's judgment non-final, depriving this Court of jurisdiction to pass upon the questions presented. *See* 28 U.S.C. § 1257.

This case falls within the third exception to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975): "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. First, contrary to the respondent's contention, the decision below "finally decided" the federal claim. The respondent argues that the further proceedings ordered in this case "relate[ ] to the constitutionality under the fourth amendment of the instant search." Br. in Opp. at 6. This characterization of the Connecticut Supreme Court's decision is simply wrong. The court unquestionably concluded that "the evidence [was] unlawfully seized from the vehicle"; Pet.'s App. at 21a; and it is clear that an inquiry under the "inevitable discovery" exception to the Exclusionary Rule presupposes a Fourth Amendment violation. *Nix v. Williams,* 467 U.S. 431, 443 (1984). The record demonstrates that the Connecticut Supreme Court finally decided the federal claim.

Moreover, the third exception recognized in *Cox* is applicable because, if the state prevails on the remand, it cannot appeal therefrom. The absence of "aggrievement" precludes any appeal in the state court system. *See* Conn. Prac. Bk. § 4000; *Delevieleuse v. Manson*, 184 Conn. 434, 436, 439 A.2d 1055 (1981). Since a party who prevails cannot be "aggrieved" by a trial court judgment, and since a petition for a writ of certiorari must be sought with respect to the judgments of the highest court of a state; 28 U.S.C. § 1257; further review cannot be had if the state prevails in subsequent state court proceedings.

If the state loses on the remand, the judgment of conviction, which is conditioned upon an *adverse* ruling on the respondent's suppression motion, would necessarily be vitiated. *See* Conn. Gen. Stat. § 54-94a (appeal permitted after plea of nolo contendere conditional where suppression motion denied). The case would have to be dismissed by the trial court for insufficient evidence. Further review by appeal would be barred by the doctrine of res judicata, however, because the issue the state would seek review of (the validity of the auto search conducted in this case) already has been finally decided by the state's highest court in this case. *See State v. Wilson*, 180 Conn. 481, 485–87, 429 A.2d 931 (1980). Moreover, a decision by the Connecticut Supreme Court that an appeal by the state after remand proceedings would be barred by the doctrine of res judicata would itself constitute adequate independent state grounds precluding review by certiorari. *See Herb v. Pitcairn*, 324 U.S. 117, 125–6 (1945). Thus, this case would fit within the third exception to the final judgment rule identified in *Cox;* review of the important federal questions presented in this case is either now or never.

Even if later review by certiorari could be had in this case, however, the fourth exception to the final judgment rule set out in *Cox* would warrant consideration of this petition at this time. That is so because (1) the federal issue has been finally decided; (2) the state might prevail in further proceedings on grounds different from the federal question already resolved

(rendering unnecessary review of the federal issue by this Court); (3) reversal of the state supreme court on the federal issue would be preclusive of any further litigation in this case; and (4) a refusal to review the decision at this time "might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482–83.

The petitioner has already addressed the finality of the state supreme court's resolution of the federal claim. *See infra* at 2. The only other component of the fourth exception recognized in *Cox* that the respondent appears to challenge is whether some federal policy would seriously be eroded if review by this Court were deferred.

As this Court observed in *New York v. Belton*, 453 U.S. 545 (1981), uncertainty in the law that controls the search of an automobile after the roadside arrest of its operator can only undermine effective law enforcement and jeopardize protection of Fourth Amendment rights. *Id.* at 458–60. And while this Court has sought to clarify the applicable law; *ibid;* the ruling of the court below casts doubt on the requisites of an inventory search as well as the meaning of the "substantial contemporanety" component of the search incident to arrest exception to the warrant requirement. Because delay in the resolution of the questions presented would require state law enforcement officials to operate on a daily basis in the shadow of a confusing and constitutionally suspect state court interpretation of the federal constitution, and because the other prerequisites to review under the fourth exception to the final judgment rule recognized in *Cox* have been satisfied, the questions presented should be reviewed.[1]

---

[1] This Court's decision in *Flynt v. Ohio*, 451 U.S. 619 (1981) does not militate toward a different result. In *Flynt* the heart of the prosecution, i.e., whether the material alleged to be obscene was in fact obscene, remained to be resolved by the state courts. Whether prosecution of Flynt was selective and discriminatory, as he alleged in his certiorari petition, was closely related to the larger unresolved First Amendment issue.

(continued)

II. BECAUSE THE CONNECTICUT SUPREME COURT ELECTED TO PASS UPON THE QUESTION WHETHER THE AUTO SEARCH WAS REASONABLE UNDER THE FOURTH AMENDMENT AS AN INVENTORY SEARCH, THIS COURT HAS JURISDICTION OVER THE FIRST QUESTION PRESENTED

The respondent correctly points out that, although the trial court predicated its decision in part on the alternative ground that the search could be justified under the Fourth Amendment as an inventory search, the petitioner relied in its brief on appeal upon the other bases of the trial court's decision. App. to Br. in Opp. at 1A. Nevertheless, at oral argument before the state supreme court the petitioner did press the inventory exception to the warrant requirement. This fact is confirmed by the supreme court's opinion. Pet.'s App. at 20a ("[t]he state also contends that the warrantless search and seizure of the contents of the black bag were constitutionally permissible in order to inventory the contents of the vehicle"). In any event, the supreme court fully addressed the applicability of the inventory exception in this case. *See* Pet.'s App. at 20a–21a.

The respondent nevertheless contends that this Court should not address the first question presented because, he claims, the petitioner did not press it before the state supreme court. Br. in Opp. at 14–15.

---

[1] (continued)

In this case the central issue, whether the Fourth Amendment was violated by the action of the police, has finally been resolved in the state courts. Further proceedings cannot illuminate that issue or render it any less significant to the administration of criminal justice in Connecticut.

Similarly, in *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621 (1981), the Court simply could not reach the federal question presented because proceedings ordered by the state courts could have altered substantially the factual predicate of the federal question (whether a taking under the Just Compensation Clause of the Fifth Amendment had in fact occurred).

As this Court has clearly said, however,

> "[s]ince the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate or independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question." *Beecher v. Alabama*, 389 U.S. 35, 37 n.3, 19 L. Ed. 2d 35, 88 S. Ct. 189 (1967). This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134, 58 L.Ed.2d 1245, 34 S. Ct. 874 (1914).

Orr v. Orr, 440 U.S. 268, 274-5 (1979).

The first question presented, which was passed upon below, is properly before this Court.[2] *See Illinois v. Gates*, 462 U.S. 213, 218-22 (1983).

---

[2] Although the petitioner does not consider response by separate argument on the merits to be warranted here, it does bring to the Court's attention a recent decision of the Ninth Circuit that confirms the importance of the first question presented relating to inventory searches. In *United States v. Feldman*, 788 F.2d 544 (9th Cir. 1986), the court, confronted with an "on-the-spot" inventory search similar to the one conducted here, concluded that the police department's conferral of "complete discretion [upon] its officers to decide when and where to inventory the contents of [an impounded vehicle]" did not render the search unreasonable under the Fourth Amendment. *Id.* at 551. Rather, drawing upon the Fifth Circuit's decision in *United States v. Prescott*, 599 F.2d 103, 105-106 (5th Cir. 1979), the court acknowledged that it is the " 'increasingly common practice for police to conduct inventory searches of vehicles incident to their impoundment' "; *id.* at 552 (citation omitted); and went on to say that "standard police practice" under *Opperman* could exist " 'in the sense that [the search involved] was of the type repeatedly recognized by the courts as efficacious and constitutionally reasonable.' " *Ibid.* (citation omitted). Finally, the court concluded: "[s]wift and effective actions by an officer to secure a gun which he or she reasonably believes to be in an empty impounded car should be recognized as 'standard police procedure' for inventory search purposes as much as rote adherence to established written inventory procedures validated in *Opperman*." *Ibid.*

CONCLUSION

For these reasons, and those set out in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

THE STATE OF CONNECTICUT
Petitioner

BY: JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

With Whom On The Brief:

JOHN J. KELLY
Chief State's Attorney

JOHN T. REDWAY
State's Attorney

JUDITH ROSSI
Deputy Assistant State's Attorney

October, 1986